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No. (1)

Supreme Court, U.S.
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In The

# Supreme Court of the United States

LAVON JONES, JR.,

*Petitioner,*

v.

BAYER HEALTHCARE LLC,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Should the Court exercise its supervisory power over the lower federal courts by reviewing the grant of summary judgment in this employment discrimination case where there were disputed issues of fact requiring a jury trial, in light of the extensive granting of summary judgment against plaintiffs by federal courts in such cases?

2. Did the courts below improperly grant summary judgment against plaintiff with regard to his claims of retaliation and discrimination, in violation of his statutory and constitutional right to trial by jury, in light of issues of fact that a jury could have resolved in his favor?

3. Was petitioner denied his right to a jury trial guaranteed by the Seventh Amendment to the Constitution of the United States by the lower courts deciding disputed questions of fact through the improper use of summary judgment?

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Petitioner, Lavon Jones, Jr., respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is set out in Appendix A at pages App. pp. 1-4, and is unreported. The Order of the Court of Appeals denying petitioner's' petition for rehearing and rehearing en banc is set out in Appendix C at pages App. pp. 27-28, and is unreported. The decision of the United States District Court for the Northern District of California is set out in Appendix B at pages App. pp. 5-26, and is unreported.

## STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 2008, and the order denying the timely petition for rehearing and rehearing en banc was entered on January 20, 2009. On April 8, 2009, Justice Kennedy granted petitioner's application for an extension of time to file the petition for writ of certiorari to May 20, 2009. (Appl. No. 08A870.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

42 U.S.C. § 1981provides:

(a) Statement of equal rights

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and

to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

(R.S. Sec. 1977; Pub. L. 102-166, title I, Sec. 101, Nov. 21, 1991, 105 Stat. 1071.)

42 U.S.C. § 2000e-2(a)(1)(2) provides:

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(Pub. L. 88-352, title VII, Sec. 703, July 2, 1964, 78 Stat. 255; Pub. L. 92-261, Sec. 8(a), (b), Mar. 24, 1972, 86 Stat. 109; Pub. L. 102-166, title I, Secs. 105(a), 106, 107(a), 108, Nov. 21, 1991, 105 Stat. 1074-1076.)

42 U.S.C. § 2000e-3(a) provides:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(Pub. L. 88-352, title VII, Sec. 704, July 2, 1964, 78 Stat.

257; Pub. L. 92-261, Sec. 8(c), Mar. 24, 1972, 86 Stat. 109.)

## STATEMENT OF THE CASE

This case seeks review of the decision of the Court of Appeals for the Ninth Circuit in an appeal from an order entered in favor of respondent Bayer Healthcare (hereinafter "Bayer") following the granting of respondent's motion for summary judgment as to all of Petitioner's claims.

Petitioner Lavon Jones, Jr., plaintiff/appellant below, filed charges with the Equal Employment Opportunity Commission, claiming discrimination based on race, as well as retaliation for engaging in protected activities. ER 459.[1] Subsequently, he filed this action in the Northern District of California pursuant to 28 U.S.C. § 1331, raising claims of racial discrimination and retaliation under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 1981, and California law.[2]

Following discovery, respondent filed a motion for summary judgment, supported by declarations and exhibits, with regard to all claims. ER 496-1143; 051-195. Petitioner filed declarations and exhibits in

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[1]Record citations are to the Excerpts of Record ("ER") filed by Petitioner in the Court of Appeals.

[2]Mr. Jones initially was one of four plaintiffs in a class action filed against Bayer Healthcare. However, the district court granted Bayer's motion to sever, and Petitioner filed his individual complaint on June 28, 2005, for damages caused by employment discrimination against the respondent. ER 1151.

opposition. ER 196-495. On March 21, 2007, the district court issued its order and judgment granting defendants' motion for summary judgment and dismissing the case in its entirety. App. pp. 5-26.

Petitioner filed a timely notice of appeal and the Court of Appeals affirmed the decision of the District Court on December 1, 2008. App. pp. 1-4. Petitioner filed a timely petition for rehearing and rehearing en banc, which was denied on January 20, 2009. App. pp. 27-28.

## STATEMENT OF FACTS

Petitioner's claims of discrimination and retaliation, as explained in detail below, centered on his treatment after he applied for a position as a mechanic in Bayer's Heating, Ventilation, and Air Conditioning department (HVAC). After fighting his way into the department Mr. Jones, the only African-American mechanic, encountered difficulties and treatment significantly different than comparable Caucasian mechanics. Eventually, he filed an internal discrimination complaint with the company's human resources department and, when that was rejected, he filed with the Equal Employment Opportunity Commission.

After his EEOC complaint had been denied, Mr. Jones was subjected to disciplinary actions that culminated in his being terminated in January, 2003, for purported falsification of records, a charge he denies. The supervisor who terminated him had been named by Mr. Jones shortly before in a grievance in which it was alleged that a prior disciplinary action had been taken in retaliation for his having complained of

discrimination.

A. Petitioner's Employment at Bayer and His Applications for a Mechanic's Position in HVAC.

Petitioner Lavon Jones, Jr., was employed at the Berkeley, California, facility of Bayer Healthcare from February, 1997, until January, 2003. Declaration of Lavon Jones, Jr., in Support of Opposition to Motion for Summary Judgment (Hereinafter, "Jones Decl."), p. 1, ¶ 2; ER 452. From 1997 until early in 2001 he worked as a maintenance worker. His work record during this time was good and he was regarded as a valuable employee.

In August, 2000, Mr. Jones completed a course of study in Heating, Ventilation, Air Condition and Refrigeration. Jones Decl., p. 3, ¶ 6; ER 454. In September, 2000, he applied for a Mechanic B level position in the HVAC Department of Bayer.[3] Mr. Jones was turned down for the position and was advised to seek job leads elsewhere. Jones Decl., pp. 3-4 ¶¶ 7-8; ER 454-55. Other than Mr. Jones, no African Americans worked in HVAC as mechanics from at least

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[3]Three levels of the Mechanic position in HVAC are referred to in the discussion that follows. Mechanic C is the lowest level and is, in essence, an apprentice or training position. Mechanic B is the next level. Mechanic A is, in essence, a journeyman position and requires meeting the Mechanic B requirements as well as significant work experience in the field. After Mechanic A, an individual is eligible to be promoted to the position of Senior Mechanic.

2000 until early 2006.[4]

In late October 2000 Mr. Jones applied for a Mechanic C level position at HVAC. Jones Decl., p. 4, ¶ 9 ER 455. On this occasion Mr. Jones (and other applicants) was interviewed by all the subordinates and supervisors in HVAC, all of whom were white. Mr. Jones was the only one of the applicants with any HVAC experience. However, the position was given to a Caucasian with a chemistry background and no HVAC experience.[5] Mr. Jones contested the selection and, in his words "had to fight to obtain the position." Jones Decl., p. 4, ¶ 11. ER 455. He complained to the Union, which filed a grievance with the Bayer Human Resources department and the job was given to Mr. Jones. Jones Decl., ¶ 11. ER 455.[6]

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[4]Jones Decl., p. 4 ¶ 12 (ER 455); pp. 11-12, ¶ 34; ER 462-63. Deposition of Ronald Roberts (hereinafter "Roberts Dep.), pp. 28, ll. 13-25; 29, ll. 1-5, ER 348-49. Deposition of Richard Smith (hereinafter, "Smith Dep."), pp. 22, ll 3-5, 11-20; 23, ll 23-25; 24, ll 1-11(ER 202-04); Ex. 2 (ER 261).

[5]Jones Decl., p. 4, ¶ 10. ER 455. Roberts Dep., pp. 89, ll 11; 91, ll 24-25. ER 358; 364.

[6]Mr. Roberts, the HVAC Supervisor, attempted to impose a seventy-five day probation period under which if Mr. Jones did not meet the required performance requirements, he could be subject to disciplinary action or termination from Bayer. This requirement was not proper under the Union contract. Jones Decl., p. 4, ¶ 11. ER 455. Deposition of Sherri O'Driscoll (hereinafter "O'Driscoll Dep."), p. 27, ll 1-9, ll 18-20. ER 336.

B. The Treatment of Petitioner in HVAC.

During the entire time Mr. Jones worked in HVAC he was treated differently from the other employees in HVAC, none of whom were African American. He was not allowed to order a uniform right away but after about thirty days he eventually had to order one himself. Jones Decl., p. 4, ¶ 12. ER 455. Mr. Jones was instructed by Mr. Roberts not to handle any tools and to observe only. He was given hand-me-down tools and never received all the tools he needed to perform his job. Jones Decl., p. 4, ¶ 11. ER 455. Smith Dep., p. 76, ll 18-24; Ex. 13. ER 234-35; 273-74. Caucasians hired after Mr. Jones got a full compliment of the necessary tools within ten days of hire. Jones Decl., p. 4, ¶ 12. ER 455. Similarly, he was not given a two-way radio until several months into employment. All new hires after Mr. Jones who were Caucasian were given one immediately. Jones Decl., p. 4, ¶ 12. ER 455.

Because he was not given adequate tools or a two-way radio Mr. Jones was criticized by his Caucasian co-workers for his performance. Jones Decl., p. 5, ¶¶ 13-14. ER 456. Mr. Jones asked for a meeting because he wanted to deal with the problems he was having and establish rapport with his fellow workers, but at the meeting he was subjected to ridicule, threatening comments and disrespect from his supervisor and coworkers. Jones Decl., p. 5, ¶ 14. ER 456.[7]

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[7]In April, 2001, Mr. Jones's supervisor attempted to impose conditions on his employment. He was advised to extend his evaluation period for an additional seventy-five days and to include a class on interpersonal skills or

The subsequent hiring of Caucasians sharply contrasted with the experience of Mr. Jones. Scott Higgins came into HVAC in the summer of 2001 at a B level, higher than Mr. Jones's C level, even though he had no HVAC experience or training. Jones Decl., pp. 5-6, ¶ 17. ER 456-57. Mr. Jones had to train Mr. Higgins and help him do basic procedures that he was not familiar with. Another Caucasian, Darin Christensen, was hired at the B level but had little experience doing electrical work and did not even know how to use a voltmeter so that Mr. Jones had to show him how. Jones Decl., p. 6, ¶ 17. ER 457. A third Caucasian employee was hired into HVAC at the B level around the same time. None of these hires had to go without tools, uniforms, or unfair employment conditions. Even though Mr. Jones was promoted to B level shortly after these individuals were hired, they were offered overtime, training, and were assigned as Sub Supervisor on tasks over Mr. Jones. They were assigned tasks that would allow them to learn and advance and he was not. Jones Decl., pp. 5-6, ¶ 17. ER 456-57.

Despite his prior lack of background in HVAC, Mr. Higgins advanced rapidly at HVAC, to the A level on March 3, 2003, and to Senior Mechanic on August 29, 2005. In contrast, Mr. Jones had to go to his supervisor, Richard Smith and request that he be promoted to a

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withdraw from the position at HVAC and go back to his prior department and job. He was advised that if he withdrew from HVAC nothing negative would be added to his personnel file. Mr. Jones rejected both options and remained at HVAC. Jones Decl., p. 5, ¶ 15. ER 456.

Mechanic B position. As a result he was promoted to the B level on September 3, 2001. Jones Decl., p. 6, ¶ 19. ER 457. The documentation prepared by Mr. Smith when he approved the promotion clearly shows that Mr. Jones's work was satisfactory and justified a promotion to a higher level. Thus it states that Mr. Jones had "shown a great forward movement such as being able to troubleshot [sic] misc work orders and performs PM's with minimum assistance."[8] Mr. Jones was never promoted above the Mechanic B position.

### C. Evidence of Retaliation Against Petitioner

As a result of these and other experiences, Mr. Jones exercised his rights under Bayer procedures and federal law to engage in the following protected activities. On or about May 1, 2002, he filed an internal complaint of discrimination with Bayer's Human Resources Department.[9] Human Resources conducted an investigation and a representative met with Mr. Jones and other employees in HVAC. Jones Decl., p. 8, ¶ 22. ER 459. Because of the investigation, Richard Smith, Petitioner's supervisor, "guessed" that the complaint had something to do with discrimination. Smith Dep., pp. 96, ll 308, 16-25; 97, ll 1-23. ER 242-43. The investigation was concluded with a decision by

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[8]Smith Dep., pp. 118, ll 15-25; 119 ll 1-25; 120 ll 1-8 (ER 286-88), Ex. 19. ER 310.

[9]Jones Decl., p. 8, ¶ 22. ER 459. Deposition of Joseph Gallagher (hereinafter "Gallagher Dep."), pp. 21, ll 2-9, 18-23; 26, ll 14-18. ER 382; 383.

Human Resources that no discrimination had been shown.

On or about July 3, 2002, Mr. Jones filed a complaint with the United States Equal Employment Opportunity Commission charging racial discrimination.[10] A number of HVAC employees received e-mails from Human Resources telling them that they would be interviewed by the EEOC. Jones Decl., p. 8, ¶ 22. ER 459. On December 16, 2002, the EEOC issued a decision rejecting the complaint. In December, 2002, Mr. Jones sent more documents to the EEOC and the EEOC treated this submission as a request for reconsideration. The request for reconsideration was denied on January 29, 2003. Jones Decl., p. 8, ¶ 22. ER 459.

Following the initial decision of the EEOC rejecting Mr. Jones's complaint on December 16, 2002, a series of incidents occurred that culminated in Mr. Jones being terminated. In January, 2003, Richard Smith told Mr. Jones that he would be on a team for a maintenance assignment. Mr. Jones came in at 3 a.m. with four other HVAC mechanics. After he had come in on a couple of days he realized that the assignment should have been based on seniority. Mr. Jones called Mr. Smith and left a message on his voice mail at 9 p.m. the evening before one of the shifts was to start at 3 a.m. that he would not be in. Jones Decl., pp. 8-9, ¶ 23. ER 459-60. Mr. Smith suspended Mr. Jones for three days as a result of Mr. Jones having phoned in late.

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[10]Jones Decl., p. 8, ¶ 22. ER 459. Gallagher Dep., p. 27, ll 1-11. ER 384.

As part of the suspension, Mr. Smith charged that Mr. Jones had misused overtime by working double time without prior authorization. On the occasion charged eight hours of work were scheduled. Jones Decl, p. 9, ¶ 24. ER 460. Mr. Jones was never told that double time overtime had to have prior authorization. Jones Decl., p. 9, ¶ 24. ER 460.

Mr. Jones filed a union grievance challenging the three-day suspension on January 12, 2003. In the grievance he charged that the suspension by Mr. Smith was "vindictive behavior transpired from a pending EEOC charge."[11] On January 22, 2003, a meeting was held to discuss the grievance that was attended by Mr. Gallagher and Richard Smith. Mr. Gallagher reviewed Mr. Jones's record with Mr. Smith and discussed Mr. Jones's discrimination charges.[12]

On or about January 23, 2003, Mr. Jones was given an assignment to change filters on air conditioning and air handling units on the roofs of certain buildings. Jones Decl., p. 9, ¶ 26. ER 460. The job was more than a one-man, one-day job, but Mr. Jones was told that it had to be finished by him on January 24, 2003

On the morning of January 24, 2003, the day the filter job had to be finished, Mr. Jones was paged by Joe Haberstroh, a co-worker, telling him that Richard

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[11]Jones Decl., p. 9, ¶ 25 (ER 460); Gallagher Dep., p. 39, ll 13-25 (ER 387), Ex. 8. ER 412.

[12] Gallagher Dep. pp. 28, ll 23-25; 29, ll 3-14; 42, ll 19-25; 43, ll 20-25; 44, ll 1-15. ER 385-86; 390-91; 393.

Smith, who was in a meeting and not reachable, had told Mr. Haberstroh to tell Mr. Jones to come help him on a job. Jones Decl., p. 9, ¶ 27. ER 460. Just before Mr. Jones got the call from Mr. Haberstroh, a union representative had called him and told him that there was a noon meeting that same day with all of his co-workers. Mr. Jones called Mr. Gallagher in Human Resources and asked to meet him so that a representative from Human Resources could be at the noon meeting since Mr. Jones would be the only African American there. Mr. Gallagher told Mr. Jones to come and see him at 10:30 am. Jones Decl., p. 9, ¶ 27. ER 460. Mr. Jones told Joe Haberstroh that he had a meeting with Mr. Gallagher and asked him whether it was all right to meet with Mr. Gallagher. Mr. Haberstroh said it was all right. Jones Decl., pp. 9-10, ¶27. ER 460-61.

Mr. Jones went to Mr. Gallagher in Human Resources and asked him to come to the meeting at noon. Mr. Gallagher said no one from Human Resources needed to be there since only union personnel would be present. Jones Decl., p. 10, ¶ 28. ER 461. Mr. Jones denied that Mr. Gallagher told him that he had to get permission before he went to meet Mr. Gallagher. Jones Decl., p. 10, ¶ 28. ER 461. In any event, he had asked Mr. Haberstroh, who was in charge of the job he had been assigned to that morning, if it was all right to go to Human Resources and Mr. Haberstroh had given his approval. Jones Decl., p. 10, ¶ 28. ER 461.[13]

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[13] After Mr. Jones met with Mr. Gallagher he went back to help Mr. Haberstroh and Mr. Higgins. When Mr.

Richard Smith testified that during the morning of January 24 he had gone to the roof, ostensibly to check on Mr. Jones's work in connection with Mr. Jones's request to be promoted to grade A. He claimed that he saw that one of the filters was dirty and that later in the day he returned to the roof and took pictures of the units.[14] In direct contradiction to Mr. Smith's testimony, James Jewell testified that Mr. Smith had sent him, Mr. Jewell, to the roof that afternoon to take the pictures.[15]

Mr. Jones went to the meeting at noon. Even though Mr. Gallagher had told him only union personnel would be there, Richard Smith, the supervisor, was also there. A number of the Caucasian members in the work group were hostile towards Mr. Jones and they had requested an urgent meeting to question him on why he had filed a complaint with the EEOC and a grievance with Human Resources. Richard Smith elaborated and asked why Mr. Jones had gone to HR and the EEOC, and said Mr. Jones should have come to the group. Joe Haberstroh said to Mr. Jones that he would "never trust your ass again." Scott Higgins asked why Mr.

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Jones got to the area the job was completed and he was not needed. Jones Decl., p. 10, ¶ 28. ER 461.

[14]Smith Dep., pp. 148, ll 12-25; 149, ll 1-7; 150, ll 12-19; 153 ll. 14-16, 22-25; 154, ll 1-15 (ER 291-94), Exhibit 26. ER 319-23.

[15]Deposition of James Jewell (hereinafter, "Jewell Dep."), pp. 29, ll 15-25; 30, ll 1-7; ll 15-21 (ER 426-27), Ex. 2 (ER 445-48).

Jones filed an EEOC charge, and "what discrimination?" Another person said that people were on edge because Mr. Jones had filed the charge and a person from refrigeration said that he could understand what the other workers were saying about filing charges and that there must be other ways. Richard Smith said nothing in Mr. Jones's defense but supported what the others were saying. Jones Decl., pp. 10-11; ¶ 29. ER 461-62.

After the meeting Mr. Jones went to finish the filter changing assignment. James Jewell paged him up to as many as four times and asked him whether he had finished the job. Mr. Jewell said that Richard Smith wanted to know if the job was finished. Mr. Jewell pressed Mr. Jones to finish on that day and stood with him while he finished and signed off on the work order so that Mr. Jewell could carry it back to Richard Smith. Jones Decl., p. 11, ¶ 30. ER 462. Mr. Jones states that there was no need for the rush to get the paper work. Mr. Jones's practice was to spend additional time to go over the paperwork and ensure that everything was correct before turning it in. Jones Decl., p. 11, ¶ 30. ER 462.[16]

Richard Smith never asked Mr. Jones about the filters or talked to him about any dirty filters that were

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[16]When Mr. Jones was finished he discarded the dirty filters. However, when he had been called away to work with Mr. Haberstroh the morning of January 24 he had left a box of dirty filters in the work area since he had not finished the job. The dirty filters could have been accessed by anyone. Jones Decl., p. 11, ¶ 31. ER 462.

still on a unit. Mr. Smith never asked him whether he had finished the job, only Mr. Jewell did. Mr. Smith did not talk to Mr. Jones on January 24 or on January 27 about the filter job, and he had never checked behind Mr. Jones's work before this time. Jones Decl, p. 11, ¶ 31. ER 462.

On January 28, 2003, Petitioner was called to Human Resources, and told he was fired. He was terminated for two purported reasons: (1) he had falsified records by stating that he had changed all the filters; and (2) he had met with Mr. Gallagher without having gotten prior approval to leave his assigned job. Mr. Gallagher, Mr. Smith, Mr. Nitze, and a union representative were there. Mr. Jones had no prior knowledge that he was going to be fired, no one had talked to him, and he was not asked to give any statement regarding the allegations against him. Jones Decl., p. 11, ¶ 33. ER 462. Mr. Gallagher testified that Mr. Jones was not asked for an explanation because "it was an information meeting. It was not an investigatory meeting." In contrast, Mr. Smith claimed that Mr. Jones was asked for an explanation during this meeting.[17]

Mr. Gallagher, who approved the termination of Mr. Jones, testified that he was sure that Mr. Smith had spoken to Mr. Jones about the filter job *before* the January 28 meeting and had asked Mr. Jones what had happened because that was the procedure to be followed, although he could not say that he was present

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[17]Gallagher Dep., p. 61, ll 10-17. ER 400. Smith Dep., pp. 166, ll 23-25; 167, ll 1-14. ER 306-07.

during such a conversation. Mr. Smith, on the other hand, testified that he had not spoken to Mr. Jones before going to Mr. Gallagher and gotten approval to fire Mr. Jones.[18]

Mr. Smith was questioned concerning a Bayer protocol that differentiated between "deliberate misrepresentation" and an error. Despite the language of the directive, Mr. Smith acknowledged that he never questioned Mr. Jones to find out whether he had made a mistake on the work order form rather than a deliberate misrepresentation.[19] Petitioner stated unequivocally in his declaration in opposition to the motion for summary judgment that he did not falsify any records, and that he was sure that he changed all of the filters. Jones Decl., p. 9, ¶ 26. ER 460.

D. The Decision of the District Court

In its decision, the district court first held that Petitioner had not established a *prima facie* case with regard to his claim of discrimination. In so holding, the court focused almost entirely on Mr. Jones's not having been promoted to a level A mechanic. App. pp. 12-19. The court held that a *prima facie* case of retaliation had not been established because Mr. Jones had been terminated in January, 2003, more than six months after he had filed his initial complaint of discrimination. App.

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[18]Gallagher Dep., pp. 61, ll 18-25; 62, ll 1-25; 63, ll 1-25; 64, ll 1-25. ER 400-03. Smith Dep., pp. 150, ll 8-25; 151, ll 11-15; pp. 166, ll 23-25; 167, ll 1-14. ER 293-94; 306-07.

[19]Smith Dep., p. 152, ll 5-11, (ER 295) Ex. 25; p. 152, ll 12-16. ER 295; 318.

pp. 22-24. In so holding, the court did not mention or discuss the fact that Mr. Jones had filed a grievance claiming retaliation because he had filed an EEO charge earlier in January, 2003, and that a meeting had been held on the grievance a week before his termination. Nor did the court mention the meeting on January 24 at which Petitioner was criticized by his supervisor and co-workers for having filed discrimination complaints. *Cf.* App. pp. 22-24.

With regard to both claims, the court held that even if a *prima facie* case had been established, Petitioner had failed to establish pretext. App. pp 19-22; 24.[20]

E. The Decision of the Court of Appeals

The Ninth Circuit summarily affirmed with an unpublished opinion. App. pp. 1-4. With regard to the retaliation claim, the Court evidently concluded that Petitioner had made out a *prima facie* case. However, the Court also held that the Respondent had met its burden of introducing evidence of a legitimate, non-discriminatory reason, and that the Petitioner had not demonstrated pretext. As will be discussed below, in

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[20]The district court also held, as an alternative basis for dismissing the case, that after-acquired evidence that purported to establish that Mr. Jones had given misinformation on his original job application required that Mr. Jones's claims of both discrimination and retaliation be denied in their totality. App 24-25. Petitioner appealed this holding as being inconsistent with this Court's decision in *McKennon v. Nashville Banner Corp.*, 513 U.S. 352 (1995). The Court of Appeals did not reach this question.

its decision the Court of Appeals made a number of factual statements that were either unsupported in the record or that conflicted with evidence that the Petitioner had introduced in opposition to the motion for summary judgment. With regard to the discrimination claim, the Court of Appeals affirmed both of the District Court's holdings that Petitioner had failed to establish a *prima facie* case. App. p. 2.

Petitioner filed a timely petition for rehearing and rehearing en banc. The petition was denied, thus occasioning this petition for writ of certiorari. App. pp. 27-28.

## Reasons for Granting the Writ

### I.

### Certiorari Should Be Granted to Exercise the Court's Supervisory Power Over the Lower Federal Courts' Use of Summary Judgement in Employment Discrimination Cases

The Civil Rights Act of 1991 amended Title VII to provide for jury trials for compensatory and punitive damages. And, of course, the right to a jury trial in such actions is guaranteed by the Seventh Amendment to the Constitution. *See, Curtis v. Loether*, 415 U.S. 189 (1973). However, as a recent study by the Federal Judicial Center found, summary judgment is granted against plaintiffs in employment discrimination far more often than in any other category of cases in the federal courts. Federal Judicial Center, *Report on Summary Judgment Practice Across Districts with Variations in Local Rules* August 13, 2008 (hereinafter

"FJC Report").[21]

The study examined all summary judgment motions filed in federal district courts in Fiscal Year 2006. Among its findings were the following. Ninety per cent of the summary judgment motions filed in employment discriminations cases were filed by defendants.[22] Moreover, defendants filed summary judgment motions in between thirty-four and thirty-seven percent while plaintiffs filed motions in only three percent of such cases.[23] In sharp contrast, defendants filed summary judgment motions in only nine to fourteen percent of contract and torts cases.[24]

In employment discrimination cases, thirty-five to forty-six percent of summary judgment motions were granted in whole or in part, with only twelve to

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[21]The report can be accessed at http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/$file/sujulrs2.pdf.

[22]In contrast, in contract cases 56% of summary judgment motions were filed by defendants; in tort cases, 85% of the motions were filed by defendants. FJC Report, Table 1, p. 6.

[23]FJC Report, Tables 7 & 8, pp. 12-13. Plaintiffs filed summary judgment motions in only five to six percent of all cases. The range of cases in which motions were filed reflects differences in local district court rules as to whether a structured format is required for filing such motions. In general, motions were filed in a larger percentage of cases in courts that did not require a structured format.

[24]FJC Report, Table 7, p. 12.

fourteen percent denied and another fifty-five to sixty percent with no disposition.[25] For those summary judgment motions acted upon, seventy-four to seventy-seven percent were granted in employment discrimination cases.[26]

Most tellingly, between eleven and fifteen percent of employment discrimination cases were disposed of by summary judgment, in sharp contrast with contracts and torts cases, where only three to four and one to three per cent, respectively, of the cases were so disposed of. FCJ Report Table 13, p. 17. Since defendants filed the vast majority of summary judgment motions in employment cases, virtually all of the cases disposed of by summary judgment and, therefore, without a trial, were decided in favor of defendants.

These results were consistent with other studies, all of which found that in federal courts summary judgment motions were granted much more often in civil rights cases, particularly employment

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[25]FJC Report, Table 3, p. 8. The comparable figures for con tract cases were twenty-two to twenty six percent granted in whole or in part, sixteen to eighteen percent denied, and fifty-five to sixty-four percent with no disposition. For torts cases, the figures were twenty-one to twenty-six percent, sixteen to seventeen percent, and fifty-five to sixty percent, respectively.

[26]FJC Report, Table 4, p. 9. The figures for summary judgment motions granted in contract cases were fifty-five to fifty-nine percent and in torts cases, fifty-six to sixty-one percent. *Ibid.*

discrimination cases, than in other categories of litigation. *See, e.g.*, Clermont and Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 429 (2004); Cecil, Eyre, Miletich, and Rindskopf, *A Quarter Century of Summary Judgment Practice in Six Federal District Courts*, 4 JOURNAL OF EMPIRICAL LEGAL STUDIES 861 (2007); Clermont and Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARVARD LAW & POLICY REVIEW 1, 31 (2009) (noting that "the difference in win rates between jobs cases and nonjobs cases shows that pretrial adjudication particularly disfavors employment discrimination plaintiffs").

The high level of disposition of employment discrimination cases by summary judgment has continued since the time period covered by the Federal Judicial Center. Counsel for Petitioner has reviewed cases reported in Fair Employment Practices Cases, published by the Bureau of National Affairs, in the periods July, 2007, to November, 2007, and April 2008 to August 2008, covered by volumes 101 and 103 of FEP Cases respectively. In the first period, courts of appeals affirmed sixty-five grants of summary judgment by district courts and reversed only fourteen. In the second time period, the appellate courts affirmed fifty-seven grants of summary judgment and reversed twenty-two.[27]

Commentators have also noted that summary

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[27] In a few of these cases the court of appeals affirmed the grant of summary judgment in part and reversed in part.

judgment motions have fared differently in different federal districts and circuits. Thus, Cecil, Eyre, Miletich, and Rindskopf, *op. cit. supra* examined summary judgment results in six district courts. They found marked differences between the Southern District of New York and the other five districts. 4 JOURNAL OF EMPIRICAL LEGAL STUDIES at 896-97. The Southern District "appears to have a consistently lower rate of summary judgment activity" than the other courts. Although the authors commented on the efforts of the Second Circuit to "dispel the notion that it is not receptive to summary judgment" (*id.*), they did not note decisions in the Second Circuit that scrutinized grants of summary judgment in employment discrimination cases carefully. Thus, the court has warned that caution must be exercised in granting summary judgment where an employer's intent is at issue. *See, e.g., Tomka v. The Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995); *Gallo v. Prudential Residential Services*, 22 F.3d 1219, 1224 (2d Cir. 1994); *see also, Wood v. Pittsford Central School Dist., et al.*, 2008 U.S. App. Lexis 24733 (2d Cir., Dec. 8, 2008) (holding that "We exercise caution when granting summary judgment if motive is genuinely in issue" citing *Gallo* and *McLee v. Chrysler Corp.*, 109 Fd 130, 135 (2d Cir. 1997))

Particularly noteworthy is the almost total absence in the reported decisions of discussion of the implications of the Seventh Amendment's right to a jury trial for a determination of motions for summary

judgment.[28] Petitioner does not, of course, mean to suggest that summary judgment, as provided for in Rule 56, itself violates the Seventh Amendment.[29] However, the Seventh Amendment does guarantee the right to have a jury determine issues of fact, including "the elusive factual question of intentional discrimination."[30] As the Court has recognized, the "question facing triers of fact in discrimination cases is both sensitive and difficult".[31] And a plaintiff has the right to its determination by the *proper* factfinder based

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[28] *See, Riggs v. Airtrain Airways, Inc.*, 497 F.3d 1108 (10th Cir. 2007) (affirming grant of summary judgment), for one of the few appellate decisions discussing the Seventh Amendment.

[29] As the Court held in *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986):

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

[30] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 8 (1981)

[31] *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

on the facts looked at in their totality.[32]

The importance of the proper standard to be applied in determining whether to grant summary judgment in employment discrimination cases can not be minimized. This Court held, in *Curtis v. Loether*, *supra*, that the right to jury trial was required in civil rights cases where damages are at issue, and Congress made the deliberate decision to provide for jury trials in all employment discrimination cases where damages are sought. This Court has repeatedly cautioned the lower federal courts that its decisions setting forth various methods of analyzing and deciding employment discrimination cases are not to be applied in a mechanical fashion.[33] Rather, it is crucial that the fact-finder – the jury in cases where damages are sought – consider claims of intentional discrimination based on all of the facts "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation

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[32] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993)

[33] Thus, in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) this Court stated that the method of analysis set out in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), "was never intended to be rigid, mechanized, or ritualistic." In other decisions the Court has emphasized that there is no fixed or single method of establishing intentional racial discrimination. *See, United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993); and *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989) (lower courts erred in limiting Plaintiff to one method of establishing pretext).

is pretextual."[34]

The widespread and often uncritical use of summary judgment, unaccompanied by consideration of the restraints imposed by the Seventh Amendment, threatens to undermine the decisions of this Court that have repeatedly emphasized the critical importance of vigorous enforcement of Title VII so as to carry out policies that are of paramount national importance. *See, McKennon v. Nashville Banner Publishing Co*, 513 U.S. 352, 357 (1996), and cases there cited. Moreover, the improper and widespread denial to individual plaintiffs of their rightful opportunity to have their claims heard by a jury of their fellow citizens can only lead to a loss of faith in an respect for the law.

The studies and articles cited above demonstrate that there is great concern and interest over whether employment discrimination cases are being decided against plaintiffs disproportionately and improperly.[35] For these reasons, it is the greatest importance that this Court take this opportunity to exercise its supervisory power over the lower federal courts pursuant to Supreme Court Rule 10(a) and enunciate standards to guide the lower federal courts in deciding motions for summary judgment in employment discrimination cases. In particular, the Court should re-

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[34] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10 (1981)

[35] *See*, Koppel, *Job-Discrimination Cases Tend to Fare Poorly in Federal Court*, The Wall Street Journal, Feb. 19, 2009.

emphasize the implications of the Seventh Amendment right to jury trial when deciding summary judgment motions and require that the lower courts adopt the Second Circuit's requirement and exercise caution in granting summary judgment when an employer's intent is at issue.

## II.

## THE PRESENT CASE DEMONSTRATES THE NEED FOR THIS COURT TO REVIEW GRANTS OF SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES

The present case exemplifies the need for review of the question of whether summary judgment is being used improperly and the for the establishment of standards for its use. For the purpose of this petition, we will focus on the decision of the lower courts on the issue of retaliation.

The District Court clearly resolved a number of disputed and material facts when it held both that the Petitioner had not introduced evidence that could establish a *prima facie* case of retaliation and that he had not proffered evidence from which a jury could have inferred that the reason advanced by the Respondent was a pretext for retaliation.

*First*, with regard to the *prima facie* case, the District Court held that there had been too long a gap between the date when Petitioner filed his charge of discrimination with the EEOC and time he was fired. In so doing, the District Court overlooked or ignored the evidence that petitioner had complained, in a union grievance that his supervisor was aware of, that he had been disciplined in retaliation for his having filed with the EEOC. It was less than a month after Petitioner

had filed this grievance, and less than a week after the meeting at which his fellow co-workers and the same supervisor berated him for having filed the EEOC charge, that he was terminated.

*Second*, with regard to pretext, the District Court disregarded evidence, some of which was undisputed, of conflicts of testimony of management officials regarding the events that led up to Petitioner's termination, including whether he was ever asked for an explanation for the alleged failure to change all of the filters in the air-conditioning units, from which a jury could have chosen to disbelieve the employer's version of the events.[36] The District Court also disregarded the undisputed evidence that the supervisor who had both

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[36]As this Court held in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993):

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required ". . . . .

*See also, Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000) (jury's disbelief of the reasons proffered by the employer is a sufficient basis for a finding of discrimination).

been charged by Petitioner with retaliation and who had initiated Petitioner's termination, had not asked Petitioner whether the alleged error in paperwork was a mistake or a deliberate falsification, despite the clear company policy requiring that the distinction be made.

The Court of Appeals similarly either disregarded evidence in the record or misstated the record, all of which errors were brought to the attention of the panel in the petition for rehearing.

Thus, the Court stated that:

> Jones did not allege that Smith himself made any hostile comments at the meeting, or that Smith communicated what transpired at the meeting to management personnel responsible for termination decisions. App. p. 3.

However, the record is clear and undisputed that *Mr. Smith himself* was responsible for and initiated the decision to terminate Mr. Jones immediately after the January 24, 2003, meeting at which plaintiff/appellant was upbraided by his fellow workers for filing a complaint with the EEOC and at which Mr. Smith agreed with the criticisms.[37]

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[37]Thus, in his declaration in support of summary judgment, Mr. Smith stated:

> It was agreed that Mr. Jones would be terminated for cause. The bases for *my decision* were summarized in my January 27, 2003 memorandum to Joe Gallagher, a true and correct copy of which is appended hereto

The Court further stated "that there were numerous legitimate, non-retaliatory reasons for Jones' termination." However, in fact, he had no such problems before he fought his way into HVAC, where he was the only African-American mechanic. The Court further cites his "decision to work unauthorized overtime on January 5, 2003" and his failure to report to work on a time-controlled assignment on January 6, 2003." However, Mr. Jones was disciplined by a three-day suspension for the incidents on January 5 and 6. There is nothing in the record that suggests that without the events of January 24, 2003, he would have been disciplined further, let alone terminated because of the January 5 and 6 events.

Most important, the Court seriously misapprehended the record when it accepted as established Bayer's allegations that Jones was guilty of "abandonment of job duties on January 24, 2003" and of "document falsification involving a filter changing project also on January 24." App. p. 3. These two allegations, both of which were consistently and vigorously denied by Mr. Jones, were the bases of his termination. Thus, they cannot be characterized as "legitimate" except by accepting as true Bayer's contention that Mr. Jones was guilty of either or both infractions.

Of course, it is precisely the duty of the jury, as the fact-finder, to determine who was telling the truth,

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as Exhibit "E".

ER pp. 535; 548-49 (emphasis added).

Mr. Jones, Mr. Smith, or Mr. Gallagher. If the jury believes Mr. Jones, there would be ample basis for it to conclude that the actions were not "legitimate" but were taken to retaliate against Mr. Jones for his filing both internal and external complaints charging discrimination and retaliation.

Finally, the Court stated that the "only competent evidence" Mr. Jones offered on the issue of pretext was the meeting of January 24, 2003. This conclusion also misapprehended the record. There were a series of events surrounding the termination of Mr. Jones that were established by competent evidence in the form of documents and testimony that could support a jury's determination that Mr. Jones's rights not to be retaliated against had been violated. They may summarized thus:

> 1. The failure of Mr. Smith to take any steps, including questioning Mr. Jones, to determine whether any purported misstatement in the documents prepared by Mr. Jones was inadvertent or was a deliberate misrepresentation, as clearly required by Bayer directives;
>
> 2. Conflicts in testimony between Mr. Smith and Mr. Jewell as to who checked up on Mr. Jones's work on January 24;
>
> 3. Conflicts in testimony between Mr. Smith and Mr. Gallagher as to whether Mr. Jones was ever questioned about the air filter job;
>
> 4. Mr. Jones's denial that he deliberately falsified the documents and his contention that he believes he changed all of the filters;

5. Mr. Jones's denial that Mr. Gallagher told him to get permission from his supervisor to meet with Mr. Gallagher;

6. The fact that Mr. Jones was the only African-American in HVAC, together with the difficulties he experienced in getting the HVAC job in the first place and the hostility towards him and attendant difficulties with his white co-workers, that culminated in the meeting on January 24, 2003, at which he was criticized for having exercised his rights to file claims of discrimination. A jury could conclude that Mr. Jones was seen as a malcontent and trouble-maker who should be gotten rid of because of his co-workers' anger and hostility.

In summary, the present case presents a clear example of the erroneous use of summary judgment to decide an employment discrimination case where a jury, after hearing all of the evidence, is the only proper finder of fact under the Seventh Amendment. Thus, it provides an appropriate opportunity for the Court to give guidance to the lower federal courts as to the proper standards to be applied in deciding motions for summary judgment in such cases.

## Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be granted and the decision of the court below reversed.

Respectfully Submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAVON JONES, Jr.,

*Plaintiff - Appellant,*

and

NATHANIEL WOODS, JR; HABEN BERBANE; DWIGHT DOVE

*Plaintiffs*

v.

BAYER HEALTHCARE LLC; BAYER CORPORATION,

*Defendants - Appellees*

No. 07-15555
D.C. No. CV-03-05531-JSW
MEMORANDUM*

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*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

App. 2

Appeal from the United States District Court
for the Northern District of California
Jeffrey S. White, District Judge, Presiding

Argued and Submitted October 24, 2008
San Francisco, California

Filed December 1, 2008

Before: WALLACE, THOMAS and GRABER,
Circuit Judges.

Jones appeals from the district court's summary judgment entered in favor of Bayer Healthcare LLC (Bayer) on Jones' claims of employment discrimination based on race and retaliation in employment. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367, and we have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

Jones did not establish a prima facie case of discrimination in his employment discrimination claim. He provided no evidence that he was performing his job according to Bayer's legitimate expectations during the relevant time period, and he did not identify similarly situated employees outside the protected class who received more favorable treatment than he received. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). Summary judgment to Bayer was therefore proper.

Jones did not demonstrate a genuine issue of material fact on the issue of pretext on his retaliation claim. The only competent evidence Jones offered on the issue of pretext was a January 24, 2003 union meeting, during which his coworkers allegedly made hostile comments regarding the fact that he had filed various internal grievances and discrimination complaints. Jones alleged that his supervisor, Richard Smith, was present at the meeting, and "said he could understand what everyone was saying and that filing grievances did not make any sense." Jones also alleged that Smith "said nothing in my defense but supported what the others were saying." However, Jones did not allege that Smith himself made any hostile comments at the meeting, or that Smith communicated what transpired at the meeting to management personnel responsible for termination decisions.

By contrast, the record demonstrates that there were numerous legitimate, non-retaliatory reasons for Jones' termination, including Jones' history of disciplinary problems and unsatisfactory job performance reports; his decision to work unauthorized overtime on January 5, 2003; his failure to report to work on a time-controlled assignment on January 6, 2003; his abandonment of job duties on January 24, 2003; and an incident of document falsification involving a filter changing project also on January 24. Given these legitimate and particularized bases for termination, the fact that one of Jones' supervisors participated in a single allegedly hostile union meeting

is insufficient evidence of pretext to survive summary judgment. *Manatt v. Bank of Am., NA*, 339 F.3d 792, 801, 803 (9th Cir. 2003) (rejecting retaliation claim where employer offered legitimate, nondiscriminatory reasons for termination).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

LAVON JONES, JR.,

Plaintiff,
v.

BAYER HEALTHCARE LLC,

Defendant.

No. C 03-05531 JSW

**ORDER GRANTING MOTION
FOR SUMMARY JUDGMENT**

Now before the Court is the motion for summary judgment filed by Defendant Bayer Healthcare LLC ("Bayer"). Having carefully considered the parties' arguments, the relevant legal authority, and having had the benefit of oral argument, the Court hereby GRANTS Defendant's motion for summary judgment.

## BACKGROUND

Plaintiff brings suit against Bayer alleging race discrimination under Title VII of the Civil Rights Act

of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2(a)(1)(2) (claim one); retaliation in violation of 42 U.S.C. §§ 2000e-3(a) (claim two); race discrimination – termination – in violation of 42 U.S.C. § 1981 (claim three); retaliation – race – in violation of 42 U.S.C. § 1981 (claim four); race discrimination – promotion – in violation of 42 U.S.C. § 1981 (claim five); race discrimination – termination - in violation of California Government Code § 12940(a) (claim six); retaliation in violation of California Government Code § 12940(h)(1) (claim seven); and violation of public policy in violation of Article I, Section 8 of the California Constitution and California Government Code §§ 12920 & 12940(a) (claim eight).

Plaintiff was employed by Bayer in its Berkeley facility for approximately five years as a general worker and mechanic. The main pharmaceutical product manufactured at Bayer's Berkeley facility is Kogenate FS, a clotting agent principally used by hemophiliacs to help clot their blood. (*See* Declaration of Peter Kramer at ¶ 3.) Bayer must follow rigorous internal operating procedures as well as follow the mandates of Federal Regulations and subject itself to regulatory audits. (*See id.* at ¶ 5.)

On his application materials, Plaintiff misrepresented the name of the high school he attended and misrepresented that he spent a year in college. (Declaration of Jerome Schreibstein "Schreibstein Decl.") at Ex. B at JON0525; Declaration

of Lavon Jones ("Jones Decl.") at ¶ 3.) Bayer's employment application, signed and acknowledged by Plaintiff, contained a provision that regardless of when a misrepresentation in the application materials was discovered, it would be grounds for disciplinary action, up to and including termination. (Schreibstein Decl., Ex. B at JON0441.) As a heavily regulated manufacturer of pharmaceutical products, Bayer has a zero tolerance policy for document falsification applicable in the personnel context. It is settled policy at Bayer that misrepresentation in the employment application process is sufficient grounds for termination. (Declaration of Sherri O'Driscoll at ¶ 3; Declaration of Joseph M. Gallagher at ¶ 3.)

Plaintiff was employed by Bayer as a General Worker starting in February 1997 and continued in various positions, as a janitor and an Equipment Sterilizer Washer. (*See* Shreibstein Decl., Ex. A at 29, 46-51.) In September 2000, without any previous work experience in the field, Plaintiff completed a course on climate control and refrigeration which was the only refrigeration training he had completed. (*See id.* at 55-59.) Shortly after receiving the certificate, Plaintiff applied for a position as a C-level mechanic in Bayer's HVAC (heating, ventilation and air conditioning systems) department. (*See id.* at 82-83.) After the position was offered to a Caucasian applicant, Plaintiff contested the selection by complaining to the Union and filing a grievance with Bayer's Human Resources Department. (*See* Jones Decl. at ¶ 11.) Due to his Union

seniority and his related technical training, Plaintiff was given the position beginning February 2001. (*See* Schreibstein Decl., Ex. A at 119; Declaration of Ron Roberts ("Roberts Decl.") at ¶ 4.)

Plaintiff contends that during his tenure in the HVAC Department, he was treated differently from other, non-African American employees because of a delay in ordering his uniform, the failure timely to provide him with tools and failing to give him a two-way radio. (*See* Jones Decl. at ¶ 12.) Plaintiff also contends that he was assigned to work with someone who was moody and hard to work with and he was therefore unable to learn more on the job. (*See id.* at ¶ 13.) During his probationary period, Plaintiff's supervisor reported that several fellow mechanics had complained about Plaintiff's performance, his lack of concentration on instructions, excessive use of cell phones and beepers for personal use, and lengthy disappearances from the work site. The supervisor suggested classes to help with Plaintiff's interpersonal skills, but Plaintiff insisted upon a group meeting during which he felt criticized by his fellow employees. (*See* Roberts Decl. at ¶¶ 9-10; Schreibstein Decl., Ex. A at 122-30.) Plaintiff felt that the criticisms of his performance were the product of discriminatory motive, but proffers no evidence to support his subjective perception. (*See* Schreibstein Decl., Ex. A at 128-130.)

After Plaintiff's promotion to B level mechanic,

complaints about his work continued. Such complaints included a confrontational altercation with another mechanic, repeated complaints about Plaintiff's poor attitude and work performance from co-workers, Plaintiff's failure to follow strict company policy on equipment release and lockout/tagout procedures, his missing days of work and failing to show up for a particular, time-sensitive work assignment. (*See, e.g.*, Declaration of Richard Smith ("Smith Decl.") at ¶¶ 6-8; Schreibstein Decl., Ex. A at 165-68.)

On June 24, 2002, Plaintiff filed a complaint before the United States Equal Opportunity Commission ("EEOC") alleging discrimination on account of his race. (*See* Schreibstein Decl., Ex. C at JON0060.) In his complaint, Plaintiff alleged that he was denied access to tools, training and the internet. (*See id.*) On December 16, 2002, the EEOC dismissed the charges based on lack of evidence. (*See id.*, Ex. D at JON0057.) On the same day, Plaintiff submitted additional materials before the EEOC, but as the deadline for submission had passed, the EEOC treated the submission as a request for reconsideration, which was denied as insufficient in January 2003. (*See id.* at Ex. A at 389-390, 392-93.)

When, in January 2003, Plaintiff inquired about possible promotion, his supervisor evaluated Plaintiff's performance on the changing of a fan unit filter. His supervisor determined that Plaintiff had completed the paperwork indicating the filters had been changed, but

could not account for the fact that, upon visual inspection, it appeared that there remained dirty filters in the unit. (*See* Schreibstein Decl., Ex. A at 203-209, 223-24, Ex. B at JON1715-16, JON1717; Smith Decl. at ¶¶ 14-15.)

Based on Plaintiff's past disciplinary problems, including interpersonal issues and work performance, his abandonment of the job when called upon for special assignment, and the possible serious document violation relative to the filter maintenance, Plaintiff was terminated from employment effective January 27, 2003. (Smith Decl. at ¶ 15, Ex. E at JON0625-26.) Although Plaintiff maintains that the unfulfilled promotion request and termination were racially motivated, Plaintiff was unable to identify at deposition any statement, comments, or particular actions that would indicate racial animus. (Schreibstein Decl., Ex. A at 128-130, 220-221, 228-235.) Further, Plaintiff was unable to proffer any evidence of retaliatory motive on Bayer's part. (*See id.* at 358-376.)

The Court will address the additional specific facts as required in the analysis.

## ANALYSIS

### A. Standards Applicable to Motions for Summary Judgment.

A principal purpose of the summary judgment

procedure is to identify and dispose of factually unsupported claims. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. An issue of fact is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is "material" if it may affect the outcome of the case. *Id.* at 248. If the party moving for summary judgment does not have the ultimate burden of persuasion at trial, that party must produce evidence which either negates an essential element of the non-moving party's claims or that party must show that the non-moving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210

F.3d 1099, 1102 (9th Cir.2000). Once the moving party meets its initial burden, the non-moving party must go beyond the pleadings and, by its own evidence, "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In order to make this showing, the non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). In addition, the party seeking to establish a genuine issue of material fact must take care adequately to point a court to the evidence precluding summary judgment because a court is "'not required to comb the record to find some reason to deny a motion for summary judgment.'" *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) (quoting *Forsberg v. Pacific Northwest Bell Telephone Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988)). If the non-moving party fails to point to evidence precluding summary judgment, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

B. Plaintiff's Claims for Race Discrimination Do Not Survive Summary Judgment.

Plaintiff brings his first, third, fifth and sixth claims for race discrimination and contends that Bayer failed to promote him and terminated him based on his membership in a protected class. In order to make a claim for discrimination, Plaintiff must establish that

he suffered an adverse employment action that was motivated by intentional discriminatory animus. *See, e.g., Guz v. Bechtel National, Inc.*, 24 Cal.4th 317, 353-58 (2000). The proper legal framework for determining whether Plaintiff's claim should survive summary judgment is the familiar burden shifting scheme set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

First, Plaintiff must establish a prima facie case of discrimination. *See id.*; *Guz*, 24 Cal. 4th at 351-54. Whether Plaintiff can meet his burden to establish a prima facie case of discrimination is a matter of law to be determined by the court. *Caldwell v. Paramount Unified School District*, 41 Cal. App. 4th 189, 201 (1995). If Plaintiff establishes a prima facie case, the burden then shifts to Defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. Then, in order to prevail, Plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision was a pretext for another, discriminatory motive. *See Guz*, 24 Cal. 4th at 351-54; *see also Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). Plaintiff may establish a prima facie case of discrimination by demonstrating that (1) he belongs to a statutorily protected class; (2) he applied for and was qualified for an available position; (3) he suffered an adverse employment decision; and (4) similarly situated individuals not in the protected class were treated more favorably. *St. Mary's Honor Ctr. v. Hicks*, 509

U.S. 502, 506 (1993). The only significant difference in the FEHA analysis is that in order to establish a prima facie case, Plaintiff must, in addition to the first three elements, demonstrate some other circumstances that suggests discriminatory motive. *See, e.g., Guz*, 24 Cal.4th at 355.

If Plaintiff succeeds in establishing a prima facie case, the burden of production then shifts to Bayer to articulate a legitimate, nondiscriminatory reason for terminating Plaintiff's employment. *See McDonnell Douglas*, 411 U.S. at 802. If Bayer does so, Plaintiff must demonstrate that Bayer's articulated reason is a pretext for unlawful discrimination by "'either directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1124 (9th Cir. 2000) (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). Plaintiff's evidence must be both specific and substantial to overcome the legitimate reasons set forth by the employer. *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 659 (9th Cir. 2002).

1. Prima Facie Case.

At summary judgment, the degree of proof necessary to establish a prima facie case is "minimal and does not even need to rise to the level of a preponderance of the evidence." *Lyons v. England*, 307

F.3d 1092, 1112 (9th Cir. 2002) (quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994)). Although the burden for establishing a prima facie case is an easy one to satisfy, Plaintiff has failed to do so. Although Plaintiff's race makes him a member of a protected class and his failure to be promoted and termination qualify as adverse employment actions,[1] he fails to satisfy the other two prongs of the test; that is, to demonstrate that he was qualified for the position and that other, similarly situated individuals not in the protected class were treated more favorably.

a. Plaintiff has failed to demonstrate that he was qualified for the position.

There is simply no evidence in the record that Plaintiff was qualified for the position of Level A mechanic. Plaintiff's disciplinary record indicates that, due to his performance record and disciplinary actions, he was not qualified for promotion. In addition, the record demonstrates that there were numerous times when Plaintiff's performance on the job was unsatisfactory. The record is replete with instances of

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[1]As Plaintiff conceded at oral argument on this motion, because Plaintiff was terminated at the time he applied for a promotion the claims for discrimination in failing to promote him collapse under the same rubric as his termination claim.

complaints about Plaintiff's work from fellow employees and supervisors. (*See, e.g.*, Roberts Decl. at ¶¶ 9-10; Schreibstein Decl., Ex. A at 122-30.) There were complaints about a confrontational altercation with another mechanic, repeated complaints about Plaintiff's poor attitude and work performance from coworkers, Plaintiff's failure to follow strict company policy on equipment release and lockout/tagout procedures, his missing days of work and failing to show up for a particular, time-sensitive work assignment. (*See, e.g.*,Smith Decl. at ¶¶ 6-8; Schreibstein Decl., Ex. A at 165-68.) In addition, just prior to his termination, Plaintiff's supervisor determined that Plaintiff had completed the paperwork indicating some filters had been changed, but could not account for the fact that, upon visual inspection, it appeared that the there remained dirty filters in the unit. (*See* Schreibstein Decl., Ex. A at 203-209, 223-24, Ex. B at JON1715-16, JON1717; Smith Decl. at ¶¶ 14-15.)[2]

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[2]To the extent that Plaintiff attempts to rehabilitate his former testimony by submitting a declaration in connection with opposing the motion for summary judgment in which he unequivocably attests that he changed the filters (Jones Decl. at ¶ 26), such testimony is self-serving and contradicts his former sworn testimony in which he stated it was highly unlikely that he would not have changed the filters (Schreibstein Decl., Ex. A at 224). A party cannot create a triable issue of fact, and thus survive summary judgment, by contradicting his own deposition testimony with a later declaration. *Disc Golf*

Based on this evidence, the Court finds that Plaintiff has failed to demonstrate that there is a genuine dispute of material fact regarding his qualifications. Therefore, the Court finds that Plaintiff has failed to establish a prima facie case of discrimination based on demonstrating Plaintiff was qualified for the position. *See Hicks*, 509 U.S. at 506.

b. Plaintiff has failed to demonstrate that other, similarly situated individuals were treated more favorably.

In addition, Plaintiff has failed to raise a dispute of fact regarding whether other employees outside of his protected class were treated more favorably. In this regard, Plaintiff contends that during his tenure in the HVAC Department, he was treated differently from other, non-African American employees because of a delay in ordering his uniform, the failure timely to provide him with tools and failing to give him a two-way radio. (*See* Jones Decl. at ¶ 12.) Plaintiff also contends that he was assigned to work with someone

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*Ass'n v. Champion Discs*, 158 F.3d 1002, 1008 (9th Cir. 1998). Thus, Defendant's objections to those portions of Plaintiff's declaration that contradict his previous sworn testimony is sustained. Regardless of the filters incident, however, there is ample other evidence in the record indicating that Plaintiff was not performing within the qualifications required of his job.

who was moody and hard to work with and he was therefore unable to learn more on the job. (*See id.* at ¶ 13.) Also, in his complaint before the EEOC, Plaintiff contended that he was denied access to tools, training and the internet. (*See* Schreibstein Decl., Ex. C at JON0060.)

However, there is no evidence in the record that the delay in ordering a uniform or the alleged delay in providing tools or failure to provide a two-way radio or access to the internet impeded Plaintiff's performance on the job. In fact, Plaintiff so testified. (*See* Schreibstein Decl., Ex. A at 268-69, 281.) Further, during his testimony, Plaintiff was unable to identify anyone else, similarly situated, who was treated more favorably with respect to the provision of a uniform, training or tools, discipline, or the level at which others were hired and promoted in the HVAC department. (*See id.* at 237-38, 240-43, 244-48, 271-75; 195; 304-311, 313, 317.)

Because there is no evidence that other, similarly situated individuals were treated more favorably based upon their race, the Court finds that Plaintiff has not met his burden to demonstrate the existence of a prima facie case of race discrimination based on this factor. Therefore, summary judgment on Plaintiff's claim is properly granted.

However, even assuming *arguendo* that Plaintiff had established a prima facie case of race

discrimination, summary judgment is still warranted because Bayer has asserted a legitimate, nondiscriminatory reason for Plaintiff's termination, and Plaintiff has failed to demonstrate the reason is merely pretext.

2. Bayer Has Demonstrated Legitimate Business Reasons for Terminating Plaintiff.

Even if Plaintiff could successfully establish a prima facie case of race discrimination, the undisputed facts demonstrate that Bayer had legitimate business reasons for failing to promote him and instead terminating him. First, Plaintiff has proffered no evidence to demonstrate that he was qualified for promotion to level A mechanic. Second, Plaintiff's record of disciplinary problems is sufficient to establish a legitimate business reason for the determination that he should be terminated. The articulated reasons for Bayer's failure to advance and instead to terminate Plaintiff were based on the application of objective, lawful criteria and were not related to Plaintiff's race.

3. Plaintiff Fails to Raise an Issue of Disputed Fact Regarding Pretext.

Because Defendant presents evidence demonstrating a legitimate nondiscriminatory reason for the failure to promote and termination, Plaintiff

bears the burden of demonstrating that Defendant's articulated reason is pretextual. Plaintiff may do so "either [1] directly by persuading the court that a discriminatory reason more likely motivated the employer or [2] indirectly by showing that the employer's proffered explanation is unworthy of credence." *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1437 (9th Cir. 1990) (internal cites and quotations omitted).

The Court has already determined that the undisputed evidence demonstrates that Plaintiff failed to perform his duties in compliance with Bayer's expectations and explicit standard operating procedures. Plaintiff fails to refute Bayer's legitimate non-discriminatory reasons for termination and himself admits numerous times that he has no direct evidence that a discriminatory reason motivated his employer. (*See, e.g.*, Schreibstein Decl., Ex. A at 220-21, 229-235, 283-93.)[3]

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[3]Bayer's brief makes a passing reference to a comment that Plaintiff believed intimated race discrimination. (*See* Motion at 3-4.) First, the specific comment Plaintiff complains of regarding his failure to maintain eye contact does not indicate any racial animus. However, even assuming there was some racial content to the comment, it constituted a mere stray remark. *See Mondero v. Salt River Project*, 400 F.3d 1207, 1213 (9th Cir. 2005) (holding that stray remarks not acted upon or communicated to a decision maker are insufficient to establish pretext); *see also Merrick v. Farmers Ins. Group*,

Plaintiff also contends that he may infer race discrimination from the fact that he was the only African-American in the HVAC department. The Court is not persuaded by Plaintiff's argument that the Court should infer racial animus because the group fails to constitute a statistical sample. The Ninth Circuit has held that a sampling of such a small universe detracts from the value of statistical evidence. *See Morita v. Southern California Permanente Medical Group*, 541 F.2d 217, 220 (9th Cir. 1976) ("statistical evidence derived from an extremely small universe ... has little predictive value and must be disregarded.") (citations and internal quotations omitted); *see also Sengupta v. Morrison-Knudsen Co.*, 804 F.2d 1072, 1076 (9th Cir.1986) (finding that a department of 28 employees was too small for statistical analysis of race under Title VII); *but see Obrey v. Johnson*, 400 F.3d 691, 695 (9th Cir. 2005) (holding that considerations of small sample size may detract from the value of such evidence, but such statistical evidence may be probative).

Therefore, the Court finds that Plaintiff has failed to set forth any direct or indirect evidence to persuade the Court that a discriminatory reason more likely motivated the employer or any indirect evidence tending to demonstrate that the employer's proffered explanation is unworthy of credence. *See Merrick*, 892 F.2d at 1437. Having failed to raise a disputed fact

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892 F.2d 1434, 1438-39 (9th Cir. 1990) (same).

demonstrating that Bayer's articulated reason for termination is pretextual, either directly or indirectly, the Court grants summary judgment on Plaintiff's first, third, fifth and sixth claims for race discrimination.[4]

C. Plaintiff's Claims for Retaliation Do Not Survive Summary Judgment.

In his second and seventh causes of action, Plaintiff also makes claims for relief for retaliation. Similar to elements of establishing discrimination, the elements of a retaliation claim "require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant articulate a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show that the defendant's proffered explanation is merely a pretext for the illegal [action]." *Flait v. North American Watch Corp.*, 3 Cal. App. 4th 467, 476 (1992). In order to establish a prima facie case of retaliation,

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[4]Plaintiff's ninth claim for violation of public policy in violation of Article I, Section 8 of the California Constitution fails. To state a claim for termination in violation of public policy, an employee must allege (1) an employer-employee relationship; (2) termination of employment; (3) the termination was a violation of public policy; (4) the termination was the legal cause of the plaintiff's damages; and (5) damages. *Tameny v. Atl. Richfield Co.*, 27 Cal. 3d 167, 172 (1980). Because Plaintiff's claims of discrimination fail, there is no basis for alleging a violation of public policy.

the plaintiff must show that (1) he engaged in a protected activity, (2) his employer subjected him to adverse employment action, and (3) there is a causal link between the protected activity and the employer's action. *Id.; see also Akers v. County of San Diego*, 95 Cal. App. 4th 1441, 1453 (2002) (same).

Plaintiff maintains that he engaged in protected activity when he filed an internal complaint and EEOC charges. (*See* Schreibstein Decl., Ex. C at JON0060.) Plaintiff's complaint was originally filed on June 24, 2002. (*See id.*) The EEOC initially dismissed the charges based on lack of evidence in December 2002. (*See id.*, Ex. D at JON0057.) After consideration of late-filed submissions interpreted as a request for reconsideration, the EEOC denied Plaintiff's request as insufficient in January 2003. (*See id.* at Ex. A at 389-390, 392-93.)

To the extent Plaintiff claims that his complaints and alleged protected activity ultimately caused his termination, the long passage of time between the alleged protected acts (the filing of the original EEOC complaint in June 2002) and the termination in January 2003 preclude a finding of causal nexus. *See, e.g., Manatt v. Bank of America*, 339 F.3d 792, 802 (9th Cir. 2003) (holding that nine-month period of time between protected activity and alleged retaliatory action was too long to create an inference of retaliation); *see also Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (per curiam) (noting

that a court may not infer causation from temporal proximity unless the time between an employer's knowledge of protected activity and an adverse employment action is "very close" and citing cases for the proposition that a three-month and four-month time lapse is insufficient to infer causation). Therefore, Plaintiff fails to make out a prima facie case of retaliation.

However, even if Plaintiff were able to make out a prima facie case of retaliation, the Court finds that Bayer has articulated a legitimate, nonretaliatory explanation for its acts, and Plaintiff cannot show that Bayer's proffered explanation is merely a pretext for illegal action. Bayer has articulated a legitimate basis for terminating Plaintiff due to his disciplinary and performance record. Plaintiff has failed to demonstrate that Bayer's proffered reason is mere pretext for unlawful discriminatory or retaliatory motive for the same reasons he has failed to so demonstrate for his claims of race discrimination and because he lacks even temporal proximity to create an inference of retaliatory motive. Therefore, the Court grants summary judgment on Plaintiff's second and seventh claims for retaliation.

D. The After-Acquired Evidence Rule as Independent Basis for Summary Judgment.

The after-acquired evidence rule serves as a complete or partial defense to an employee's claim of

wrongful discharge. It comes into play when, after an employee's termination, the employer learns of the employee's wrongdoing that would have resulted in the employee's discharge in any event. *Camp v. Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 520, 632 (1995). To invoke this doctrine, the employer must establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it. The employer must show that such a firing would have occurred as a matter of settled company policy. *Murillo v. Rite Stuff Foods, Inc.*, 65 Cal. App. 4th 833, 845-46 (1998), citing *Waag v. Thomas Pontiac Buick, GMC, Inc.*, 930 F. Supp. 393, 408 (D. Minn. 1996).

Bayer has submitted a declaration from the manager of Human Resources indicating that Plaintiff would have been fired according to settled policy had the company known that he had misrepresented his qualifications on his job application. (*See* O'Driscoll Decl. at ¶ 3.) Plaintiff's admitted falsifications on his application materials would have, according to settled Bayer policy, been grounds for immediate termination. Therefore, the Court finds that, on this independent basis, Bayer is entitled to summary judgment.

## CONCLUSION

For the foregoing reasons, Defendant Bayer's motion for summary judgment is GRANTED. Judgment shall be entered in favor of Defendant and

against Plaintiff.

**IT IS SO ORDERED.**

Dated: March 21, 2007

JEFFREY S. WHITE
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAVON JONES, Jr.,

Plaintiff - Appellant,

v.

BAYER HEALTHCARE LLC; BAYER CORPORATION,

Defendants - Appellees.

No. 07-15555

D.C. No. CV-03-05531-JSW
Northern District of California, San Francisco

ORDER

Filed January 20, 2009

Before: WALLACE, THOMAS and GRABER, Circuit Judges.

The Petition for Panel Rehearing is DENIED.

Judge Thomas and Judge Graber have voted to deny the Petition for Rehearing En Banc, and Judge Wallace so recommends.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's Petition for Rehearing En Banc is DENIED.

(2)

No. 08-1450

Supreme Court, U.S.
FILED
AUG 2 1 2009
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

LAVON JONES, JR.,

*Petitioner,*

*v.*

BAYER HEALTHCARE LLC,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. Do the challenged decisions of the District Court and Ninth Circuit, properly applying long-standing jurisprudence in granting summary judgment in favor of Respondent in a garden-variety employment discrimination case, call for re-examination of summary judgment principles in the context of employment discrimination suits in total, where there has not even been error shown below?

II. Should this Court grant review to consider amending Federal Rule of Civil Procedure 56 to create a special rule for employment discrimination cases?

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Bayer HealthCare LLC is a wholly owned subsidiary of Bayer Corporation, an Indiana corporation. Bayer Corporation is a wholly owned subsidiary of Bayer AG, a German corporation whose shares are publicly traded on the Frankfurt exchange.

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## STATEMENT OF THE CASE

### A. Nature of the Case

Petitioner Lavon Jones, Jr. (herein, "Petitioner") contends that respondent Bayer HealthCare LLC (herein, "Respondent" or "Bayer") discriminated against him in the terms and conditions of his employment as an HVAC (Heating/Ventilation/Air-conditioning) mechanic by treating him disparately and less favorably than non-African-Americans in a variety of matters, including training, the provision of tools, and the supply of uniforms. Petitioner claims that Respondent ultimately denied him a promotion and terminated him because of his race and in retaliation for his protests and his oppositional protected conduct. The United States District Court for the Northern District of California, the Honorable Jeffrey S. White presiding (herein, the "District Court"), granted summary judgment for Respondent and the Ninth Circuit Court of Appeals affirmed and, later, denied *en banc* review. Petitioner now seeks United States Supreme Court review by his within Petition for Writ of *Certiorari* (herein, the "Petition").

### B. Statement of Relevant Facts

#### 1. Bayer's Hematology/Cardiology Global Business Unit

The Bayer site at which Petitioner worked in Berkeley, California houses Respondent's Hematology/Cardiology Global Business Unit and employs approximately 1,500 workers. The site is involved in the

research, development, and production of finished pharmaceutical products, including Kogenate FS. Kogenate FS is a drug principally used by hemophiliacs to help clot their blood; it is a life-sustaining and, in some cases, a life-saving product. (ER[1]/496-497.)

Bayer, as a producer of finished pharmaceuticals for human use, must follow rigorous internal Standard Operating Procedures ("SOPs") that are consonant with Good Manufacturing Practices ("GMPs") which, in turn, are mandated by applicable provisions of the United States Code of Federal Regulations and parallel regulations of comparable European regulatory agencies and of other regions of the world. Bayer's practices and processes in this regard are subject to scrutiny and review by the United States Food and Drug Administration ("FDA"), and like agencies in other nations. Prominent among these regulations are requirements of vigilant self-policing, including with regards to accurate manufacturing documentation. (ER/497, ¶ 5; ER/615:20-616:9.) If a regulatory audit were to uncover inaccurate record-keeping at the Bayer Berkeley site, it could lead to monetary sanctions or even a suspension of production, threatening business sustainability, Bayer's ability to employ its large, local work force and, most importantly, the health, safety, and welfare of its patient community. (ER/497, ¶ 5.)

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[1] "ER" refers to Excerpts of Record as submitted by Petitioner to the Ninth Circuit.

### 2. Petitioner Is Hired and Understands his Bayer employment Is Governed by Certain Rules of Conduct

Petitioner was offered and accepted a position as a General Worker for Bayer, starting in February 1997. (ER/575:4-9.) His duties in this position were janitorial in nature. (ER/584:14-58:5.) He had no HVAC duties. (ER/585:6-14.)

Petitioner was subject to the terms and conditions of his Bayer Company agreement, which, *inter alia*, obligated him to follow Company rules, policies and procedures. (ER/580:21-582:9; ER/1041-1044 (*esp.*, ¶ 13).) Petitioner also understood that he was required to follow certain "Company Rules." (ER/582:10-583:14; ER/503, 508-510[2]; ER/1045-1047.) These rules included prohibitions on:

- using any abusive or profane language to any supervisor, employee or visitor (ER/1045-1047, p. 2, ¶ 12, left column)
- unauthorized absenteeism or tardiness or failure to promptly report the reasons for such matters (*id.* at ¶ 14, left column)
- failing to observe safety rules and regulations (*id.* at ¶ 6, right column)
- falsifying personnel or medical records (*id.* at ¶ 8, right column)

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[2] ER/509 is mis-stamped ER/638 on the ER as served on Respondent's counsel.

- refusing or failing to perform [a] job as assigned by supervisor (*id.* at ¶ 14, right column).

Petitioner understood he could be terminated for violating these rules. (ER/1045-1047.)

### 3. Bayer Promotes Petitioner and Pays for his Technical Education

In August 1999, Petitioner enrolled in the Sequoia Institute. (ER/592:17-593:1.) Bayer paid all of Petitioner's tuition at Sequoia. (ER/593:2-6.) On or about September 8, 2000, Petitioner completed a low-grade Climate Control and Refrigeration Technology Program at Sequoia. (ER/593:18-595:21; ER/1049-1053.) This was the only HVAC training Petitioner ever had and he had no HVAC work experience at the time of his matriculation. (ER/595:22-596:18; ER/597:7-24.)

### 4. Petitioner Has an Extensive History of Interpersonal and Performance Problems at Bayer, Including at Least One Conflict with an African-American Co-worker

Throughout his Bayer employment, there were numerous incidents where Petitioner's poor interpersonal skills affected his work environment. For example, in a dispute between Petitioner and employee Michael Timberlake, also African-American, Petitioner was accused of spreading rumors and gossiping about Timberlake. Timberlake sent Petitioner an e-mail requesting he not engage in such conduct; they both then met with HR representative Sherri O'Driscoll (then

Vierra) and ultimately resolved the issues. (ER/589:11-592:16; ER/1048.)

### 5. Petitioner Is Selected to Be an HVAC Mechanic-C; Later Promoted to B-Level

In October 2000, shortly after receiving his certificate from Sequoia, Petitioner applied for an HVAC-C level position. (ER/610:2-611:2; ER/1066-1069.) He understood this to be an entry level, apprentice position; the lowest in the department. (ER/611:21-25; SER[3]/001:1-2.) Part of the assessment process for the hiring supervisor, Ron Roberts, was to measure the ability of each candidate to absorb and retain information as this was to be a position that would entail a significant learning curve. (ER/515, ¶ 3.)

Petitioner was hired into the C-level position, notwithstanding the HVAC Department's serious concerns with his competencies for the job based on his inability to demonstrate he had retained any of his training at Sequoia. (ER/608:18-609:3; ER/515, ¶ 4.) In connection with this hiring process, and in all of his dealings with him, Petitioner had no memory of Roberts ever making any derogatory remark concerning Petitioner's race or that of any other employee. (ER/612:23-613:23.) Petitioner was later promoted to a B-level mechanic position at the instance of Richard Smith, who succeeded Roberts as the department supervisor. (ER/532, ¶ 5; ER/538; ER/654:24-656:9.)

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[3] "SER" refers to Supplemental Excerpts of Record as submitted by Respondent to the Ninth Circuit.

### 6. The Crucial Importance of the HVAC Systems at the Berkeley Site

Respondent's pharmaceutical manufacturing process is dependent upon certain production steps being conducted in "clean room" environments as achieved, in part, through its HVAC systems. A clean room environment is one with exceptionally low levels of particulates, dust, germs, and other potential contaminates. This helps ensure the manufacture of contaminate-free drugs that are safe for human use. (ER/516, ¶ 5.)

The HVAC systems and the mechanics who maintain them are thus critical in Respondent's production processes and to ensure compliance with regulatory authority, GMPs, and Respondent's own SOPs. Indeed, if the HVAC systems malfunction, production may be stopped. On a more drastic level, a poorly maintained or poorly functioning HVAC system could jeopardize the sale and distribution of the Kogenate FS product line to patients as a result of product contamination. For many patients, this is a life sustaining drug, for which they have few (if any) alternatives. Thus, a significant HVAC issue could impact patient health as well posing business and other economic consequences to Respondent. (ER/516, ¶ 6.)

### 7. Petitioner Was Extensively Trained in the Requirements of Accurate Record-keeping, Safety Protocols, and Other Important Requirements of the HVAC Mechanic Position

Petitioner was provided extensive training on the requirements and importance of accurate record-keeping. (ER/614:1-622:10; ER/1070-1072; Appellee's Supplemental Excerpts of Record – *Under Seal* ("Sealed Excerpts"), SER/287-304.) Petitioner understood that a failure to adhere to Bayer SOPs could, under certain circumstances, lead to termination. (ER/622:11-623:14.)

In addition, among the most fundamental safety processes on which Petitioner was trained and qualified, were the steps involved when an HVAC mechanic services or maintains a piece of production equipment (*i.e.*, HVAC equipment that is used in or concerning site facilities where product is actually being manufactured as opposed to equipment not integral to such systems). One such fundamental process involves the equipment "release" from the local production supervisor to the mechanic. This release ensures critical notification to production personnel and approval that certain equipment will be out of service for repair/maintenance. Bayer has a specific training protocol for this step upon which Petitioner was trained and qualified. (ER/623:15-625:2; ER/1073; ER/626:20-628:11; ER/651:9-653:16; Sealed Excerpts, SER/305-308; ER/516, ¶ 7.)

In addition, following the production release of the equipment to the mechanic, the mechanic must comport with what is known as the "Site Lockout/Tagout

Procedure." This procedure, which is required for the mechanic's own safety, involves disconnecting any "hot" (electrically charged) unit that is to be worked on and physically placing a lock and tag on the unit so that it cannot be re-connected until the maintenance or service is complete. Petitioner was trained and qualified on this procedure as well. (ER/625:3-630:19; ER/1074-1083; ER/516-517, ¶ 8; ER/520-527.)

### 8. In His Relatively Brief HVAC Tenure, Petitioner Has Numerous Inter-personal Problems with Co-Workers, Violates Critical Policies and Standards, Is Insubordinate, and Is (Unsurprisingly) Lawfully Terminated for These Reasons

#### a. Petitioner's Rocky Probationary Period

At the time of his hire into the HVAC Department, Petitioner was the only C- level mechanic. (ER/631:23-632:6.) He began working in the department in February 2001. (ER/630:20-23.)

Within his first 60 days, several of the senior HVAC mechanics came to department supervisor Roberts to report challenges that they were experiencing with Petitioner, including his: (a) lack of concentration on instructions, (b) disengagement from the process, where he seemed to drift in and out and, as noted by supervisor Roberts, frequently did not even make eye contact during instruction, (c) lengthy disappearances when sent to retrieve tools and parts, and (d) excessive use of phones and beepers for personal matters. Roberts met with Petitioner to discuss these issues and he suggested

there might be some classes that he could arrange for Petitioner to improve his inter-personal dealings with the group; Petitioner refused, instead requesting a meeting with the group to which Roberts agreed. (ER/517; ER/633:19-636:22.)

At the meeting, which Petitioner attended with his Union representatives, several of his co-workers raised issues with Petitioner's lack of focus and use of cell phones, among other things. (ER/636:20-639:15.) At his deposition in this matter, Petitioner had no factual basis – just his own inferences and feelings – for concluding that this criticism was the product of a discriminatory motive. (ER/639:16-641:3.)

Because of the issues that had arisen in the department, it was offered to Petitioner that he could extend his 75-day probationary period without any formal documentation of his noted performance deficiencies; it was also suggested that Petitioner take an interpersonal skills class. (ER/517, ¶ 10.) Petitioner declined these options at which point he was formally taken off of probation and counseled by his management and Human Resources relative to the issues that had been addressed with him. (ER/642:23-650:3; ER/1084; ER/517, ¶10.)

### b. Petitioner Has a Loud, Profane Altercation with a Co-worker

On or about November 8, 2001, Joe Haberstroh, a seasoned HVAC mechanic, reported a loud, profane altercation he had with Petitioner. At Smith's request, Haberstroh prepared a written summary of the events.

(ER/532-533, ¶ 6, ER/540.) Haberstroh reported in addition to the confrontational, profane (Petitioner reportedly called Haberstroh a "motherfucker" at least three times), and threatening nature of the interchange, that he had to remind Petitioner relative to compliance with the site Lockout/Tagout procedure before working on a "hot" fan unit. Smith asked Petitioner (more than once) to also submit a written account of events but he failed to do so. (ER/532-533, ¶ 6; ER/662:20-663:1.)

A meeting was convened among Smith, Roberts (who was still a "consultant" to the group and occasionally facilitated on personnel matters), and Haberstroh, along with Petitioner and his Union representatives. (ER/663:13-664:1.) At the meeting, Petitioner again refused to acknowledge any fault in the confrontation. Additionally at the meeting, Smith revealed that one of the reasons that another senior mechanic, James Rowe, had recently left the department was that he did not wish to work with Petitioner any longer and Smith was concerned about any further losses of senior mechanics in the department. (ER/664:2-665:23; ER/533, ¶ 7; ER/542-543.)

### c. Petitioner Is Counseled for His Failure to Follow Equipment Release and Lockout/Tagout Procedures

In early November 2001, Petitioner was assigned to replace a drive belt on an exhaust fan. Petitioner completed and certified the work order without indicating that there had been a release of the equipment from production or any indication that there had been compliance with the Lockout/Tagout

procedure. (ER/656:10-661:14; ER/1085-1086.) Petitioner was counseled for his failure to comply with these important procedures, which could have jeopardized Respondent's product and Petitioner's safety. (ER/533, ¶ 8; ER/545-546; ER/666:8-669:8, ER/1087-1090.) At the time of this counseling, Petitioner denied that he had failed to comply with the procedures, instead claiming that he had in fact complied but that he just had no way to prove it. (*Id.*)

**d. Petitioner Fails to Show up for Critical Work Assignment on January 6, 2003 after Working Unauthorized Double Time the Prior Evening; He Is Suspended for Three Days as a Result**

On December 26, 2002, Petitioner was assigned to a work crew to do some preventative maintenance on Building B60 during the winter shutdown. It was explained to Petitioner (and the crew) that the work would span five days and would require 3:00 a.m. start times. Petitioner was given a schedule of the work activities and raised no objection as to the assignment. (ER/670:13-672:4; ER/533, ¶ 9.)

On January 5, 2003, a Sunday, Petitioner was scheduled to work eight hours. Without any express authorization, he worked an additional three hours – earning double time. Petitioner attempted to justify the excess hours being worked, stating that he stayed to complete some open work orders, though no one had requested the work orders be completed that day. (ER/672:5-676:21; ER/1091; ER/534, ¶ 10.) He understood that weekend overtime needed to be approved by the supervisor. (ER/670:7-12.)

The following morning, January 6, 2003, Petitioner was scheduled to participate – as part of the previously scheduled winter shutdown work - in a timed procedure involving the maintenance of an air handler unit which procedure was to begin at 3:00 a.m. With a timed procedure such as this, it is critical to have all assigned members of the team present as the failure to meet the time conditions may lead to the issuance of a Discrepancy Event Report ("DER" – now commonly called in the industry an "IR" – Incident Report); a DER/IR can cause regulatory issues and is deemed a serious matter by Bayer, which Petitioner also understood. (ER/534, ¶ 11; ER/678:19-679:12.) Instead of reporting to work on time, Petitioner left a voice mail message on Smith's cell phone indicating he was not coming in at 3:00 a.m.; that he would be in at his "regular time" – 7:00 a.m., not because he was ill or on account of other extenuating circumstances, but because he did not feel as if he should have to work his scheduled shift due to his seniority. (ER/676:22-678:18.) Smith did not play the voice mail until 5:00 a.m. and he was, unsurprisingly, unable to replace Petitioner on the shift; the short-handed crew barely completed the work on time. (ER/534, ¶ 12.)

On January 7, 2003, Petitioner was issued a three-day suspension for the failure to attend to his work duties and for working unauthorized overtime. (ER/677:4-681:20, ER 1092.) Although Petitioner stated he *believed* that his race had led to the imposition of this discipline, he could not identify anyone who had been treated more favorably by Bayer under comparable circumstances. (ER/682:3-683:23.) Nor could Petitioner

identify any facts which would establish that the discipline was in retaliation for any legally protected activity. (ER/684:8-18.)

**e. Petitioner Abandons a Work Assignment on January 24, 2003**

On January 24, 2003, Petitioner was required to assist two other mechanics with a process involving a tunnel sterilizer unit. He unilaterally determined the job did not require his participation. Without prior supervisor approval, Petitioner left his co-workers alone on the task for a meeting he had set up with HR. (ER/692:4-694:9.) Yet, Petitioner nonetheless advised HR Consultant Joe Gallagher that his supervisor had authorized the meeting. (ER/500, ¶ 5; ER/534, ¶ 13.)

**f. In January 2003, Petitioner Approaches Supervisor Smith about the Possibility of a Further Promotion; in Evaluating this Request, the Company Learns that Petitioner Has Improperly Recorded the Completion of Work, a Serious SOP Violation which, in Context with Petitioner's Entire Bayer Work History, Leads to His Lawful Termination**

In January 2003, Petitioner made an inquiry of Smith regarding a possible further promotion. (ER/685:4-20; ER/686:22-688:1; ER/1093.) In order to evaluate Petitioner's request, Smith determined, *inter alia*, to examine some recent preventative maintenance work Petitioner had been assigned, including filter change-outs. Smith did a visual

inspection of the area and determined that the filters on one fan unit had not been changed; he then pulled the paper work and saw that Petitioner had closed a work order, submitted his time entry and completed a log book indicating the work had been performed on January 24, 2003. (ER/688:22-691:2; ER/1094-1096.) Smith also determined that there were not enough filters checked out of inventory supply for the month for Petitioner to have completed the change out. (ER/291:10-293:7.) When questioned by Smith, Petitioner stated he had changed the filters and completed the documentation accordingly. (ER/534-535, ¶ 14.) At deposition, Petitioner could not account for the fact that there were dirty filters in the unit when his paperwork indicated to the contrary. Despite repeated questioning, Petitioner would *not* attest that he had in fact changed the filters. (ER/698:2-699:12; ER/1094-1095.)

At deposition, Petitioner also conceded that completion of a work order for work not done would be an instance of document falsification and a violation of Bayer policy. (ER/697:23-698:1.)

Smith advanced the issue and conferred with HR Consultant Gallagher. The two discussed the history of Petitioner's Bayer employment, his past disciplinary problems, including interpersonal issues and the three-day suspension of a few weeks earlier, his abandonment of job duties only days before, and the serious documentation violation relative to the building maintenance which would not have otherwise been discovered (were it not for Smith's inspection) and could have led to a compromised production environment.

Under all of the facts, it was determined that Petitioner's employment would be terminated. Gallagher and Smith also consulted with Joe Nitz, the superintendent over the maintenance group (which included the HVAC Department), who approved of the termination decision in consultation with then Department Manager Enrique Martinez. (ER/535; ER/548-549; ER/500-501; ER/529; ER/513, ¶ 3.)

Petitioner testified that he thought the unfulfilled promotion request and the termination were both racially motivated but – again – could not identify any statements, comments, or actions that would indicate or suggest a racial motive for the actions; only his own interpretation of the facts. (ER/695:17-696:14; ER/700:19-707:1.) Nor could Petitioner identify any evidence indicating a retaliatory motive on Bayer's part. (ER/759:1-777:17, ER/1097-1127.)

**9. Petitioner Was Treated Equally with Respect to All Terms and Conditions of his Bayer Employment**

Petitioner was provided equal access to tools, overtime, training, computer access, and promotion – and subject to discipline - pursuant to Bayer policy and business needs; no allocation of such was on the basis of race. (ER/501, ¶ 7; ER/513, ¶ 4; ER/517-518, ¶ 11; ER/535, ¶ 16; ER/530, ¶ 6.)

### 10. Petitioner Files EEOC Charge Alleging Discrimination in Terms and Conditions of Employment; Charge Is Found Without Merit; Petitioner Seeks Reconsideration and EEOC Upholds Findings that Petitioner Has No Evidence of Race Discrimination

On June 24, 2002, Petitioner filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission (EEOC), alleging that he had been discriminated against in the terms and conditions of his Bayer employment on account of his race. (ER/1135.) On December 16, 2002, the EEOC dismissed the Charge, finding a lack of any evidence to sustain a violation. (ER/1132.) Also on December 16, 2002, Petitioner filed additional, voluminous materials with the EEOC (SER/002-262); because the deadline for submissions had passed, the EEOC treated the submission as a request for reconsideration. (ER/1128-1130.) On January 29, 2003, the EEOC affirmed its earlier finding that Petitioner had failed to establish any cognizable discrimination on Respondent's part. (ER/778:13-779:19; ER/780:6-781:2; ER/1128-1132.)

## C. The District Court's Grant of Summary Judgment in Respondent's Favor

On November 3, 2006, Respondent moved for summary judgment. Its Motion was granted on March 21, 2007. (Appendix B to Petition ("App. B") at 26.)

The District Court determined that there was no triable issue of fact on Petitioner's first, third, fifth, and sixth claims for relief wherein Petitioner alleged that

he had been denied promotion and ultimately terminated on account of his race. Bayer established that Petitioner could not even make out his minimal *prima facie* case. Petitioner offered no proof he was competently performing his position (or suited for a promotion) at the time of the challenged employment actions. Indeed, the undisputed evidence was that he had (1) been involved in confrontations with co-workers and reprimanded for poor attitude, attendance and performance, (2) unilaterally determined not to show up for work for a critical time-controlled maintenance procedure, (3) left a job assignment without supervisor approval, and (4) failed to comply with employer-mandated documentation policies pertaining to HVAC maintenance. In addition, Petitioner adduced no evidence that anyone similarly situated as he – but outside of the protected class - had been dealt with in a more favorable way by Respondent. (App. B at 12-19.)

Even had he made a *prima facie* race discrimination showing, Petitioner was unable to present meaningful evidence of pre-text or discriminatory intent to refute Bayer's showing of legitimate bases for not promoting him, for terminating him, and for other claimed discriminatory employment terms and conditions. Instead, Petitioner chiefly relied on matters of his own impressions concerning people's motives, an innocuous constructive comment by a Bayer supervisor suggesting Petitioner make eye contact while interacting with group members and receiving instructions, and a statistically incompetent evaluation of the demographics of his work unit. These matters were found inadequate and the District Court entered summary judgment in Bayer's favor on Petitioner' race claims and his derivative public

policy wrongful termination eighth (in part)[4] claim for relief. (App. B at 19-22.)

Petitioner' retaliation (second, seventh and eighth (in part)) claims were found similarly wanting. Petitioner principally relied on the ostensible temporal nexus between his "protected conduct" and Bayer's complained of actions to establish the causal linkage element of his *prima facie* showing, but the more than seven-month passage of time between the filing of his EEOC Charge and the termination of his employment, against the backdrop of numerous intervening events of his own poor job performance, was found by the District Court to foreclose any such inference. Moreover, even had he made his *prima facie* retaliation case, Petitioner was unable to establish a triable issue on the ultimate requisite element of retaliatory motive as against Bayer's unrebutted showing of the performance issues leading directly to his termination. (App. B at 22-24.)[5]

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[4] Petitioner's Eighth Claim for Relief comprises allegations of retaliation and unequal treatment based on "race or color or national origin" in violation of provisions of the California Fair Employment and Housing Act and Article I, section 8, of the California Constitution. Despite the pleading allegation, there was no pursuit by Petitioner of any theory of national origin discrimination or any evidence adduced below in such regard.

[5] As an alternative basis for the grant of summary judgment, the District Court held that Petitioner's untruthful statements about his education on his original employment application would have led to termination under settled Bayer policy, and thus the termination was justified as a matter of law under the so-called "after-acquired evidence rule." (App. B at 24-25.)

### D. The Ninth Circuit Affirms

In an opinion filed on December 1, 2008, the Ninth Circuit of Appeals affirmed the District Court's grant of summary judgment. (Appendix A to Petition ("App. A") at 2-4.) The Ninth Circuit affirmed on the discrimination claims, finding there was no triable issue demonstrated concerning Petitioner's claimed acceptable job performance or that others similarly situated, but outside the protected class, had been more favorably treated. (App. A at 2-3.) In addition, Petitioner failed to adduce material, competent evidence of pretext in regards to his retaliation claim and – even had he – he was unable to rebut Respondent's demonstration of numerous legitimate bases for the termination. (App. A at 3-4.) The Ninth Circuit later denied *en banc* review. (Appendix C to Petition.)

## REASONS FOR DENYING THE PETITION

The Ninth Circuit's decision in this case does not warrant further review. The decision does not conflict with any decision of this Court or any other courts of appeals. It concerns the proper entry of summary judgment in a garden-variety employment discrimination case and there is nothing exceptional about how the District Court or the Ninth Circuit applied the Federal Rule of Civil Procedure 56 (at times, "Rule 56") standards. On the merits, moreover, the decision is clearly correct; Petitioner cannot show any error with regards to the manner in which his retaliation claims were adjudicated and does not even purport to do so with regards to his discrimination claims. This case is illustrative of exactly why the summary judgment

procedure exists – to avoid wasting judicial resources on trying a case where one party has insufficient evidence. And, such procedure does not run afoul of Seventh Amendment rights to a jury trial.

Moreover, Petitioner's call for re-examination of summary judgment jurisprudence – and implicitly, a judicially-made super-standard under Rule 56 for granting summary judgment in employment discrimination actions - is based largely on the musings of several commentators and a statistical report which reveals no clear signal. There is no demonstrated need for a special summary judgment rule in employment discrimination cases and it would not be the province of this Court to create one.

## I. THERE IS NO CONFLICT AMONG THE CIRCUITS

There is no circuit split on the standards to be used by federal district courts under Rule 56, and Petitioner does not contend otherwise.[6] (*See* Petition at 26 (relying solely on an asserted need for this Court to exercise its supervisory powers under Supreme Court Rule 10(a).)

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[6] To the extent that Petitioner suggests that there is a more nuanced application of existing summary judgment principles in the Second Circuit, that argument is discussed, *infra*, at II.B.

## II. THIS CASE DOES NOT INVOLVE AN IMPORTANT FEDERAL QUESTION, NOR DOES THE NINTH CIRCUIT DECISION DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

### A. Summary Judgment Standards Are Well Established and Require no Modification

Petitioner declares a need for this Court to set forth the proper standards to be applied in determining whether to grant summary judgment in employment discrimination cases. (Petition at 25.) But, the summary judgment standards to be applied to any summary judgment motion are entrenched in our jurisprudence and are in no need of revision:

- First, summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c).

- Second, the burden is upon the moving party to demonstrate that no genuine issue respecting any material fact exists.

- Third, all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought.

- Fourth, the moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case. When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper.

- Finally, the trial court's task at the summary judgment motion stage of the litigation is carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution.

*See Gallo v. Prudential Residential Services, Ltd. Partnership*, 22 F.3d 1219, 1223-24 (2nd Cir. 1994) (citations omitted) ("*Gallo*"). These same criteria were utilized by the District Court in this case when it granted Respondent's motion for summary judgment. (App. B at 11-12.)

As applied to an employment discrimination case in particular, this Court articulated the order and allocation of proof in the seminal case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973). The plaintiff bears the initial burden of establishing a *prima facie* case of the alleged discrimination, which has the effect of creating a legal presumption of unlawful discrimination. *Id.* If the plaintiff establishes a *prima facie* case, then

the defendant bears the burden of offering a legitimate nondiscriminatory reason for the adverse employment action. *Id.* If the defendant meets this burden, the presumption created by the *prima facie* case is rebutted, and the burden then shifts back to the plaintiff to show the employer's nondiscriminatory reason for the employment action was a pretext for the alleged unlawful discrimination. *Id.*

Review is unwarranted in this case because the District Court correctly concluded that not only did Petitioner fail to establish a *prima facie* case of discrimination in his employment discrimination claims, neither did Petitioner demonstrate a genuine issue of material fact on the issue of pretext on his retaliation claim. (App. B.) These decisions were reached based on existing and well-defined summary judgment standards as applicable to employment discrimination actions.

### B. Second Circuit Jurisprudence Does Not Suggest a New or Different Summary Judgment Standard for Employment Discrimination Cases

Petitioner asserts that summary judgment is granted disproportionately in favor of employers and that the Supreme Court, through its supervisory powers (*see* S. Ct. Rule 10(a)), should accept review in order to ". . . require that the lower courts adopt the Second Circuit's requirement and exercise caution in granting summary judgment when an employer's intent is at issue." (Petition at 27.) Petitioner relies primarily upon *Gallo*, *supra*, 22 F.3d. 1219, to support this argument. The court in *Gallo*, however, in its own words, did

nothing more than "repeat" the same long-standing, and oft-cited, standards governing *every* summary judgment motion, *id.* at 1223-24; the same criteria that were set forth by the District Court in this case. (App. B at 11-12.)

Also in *Gallo*, the Second Circuit cautioned trial courts confronted with a summary judgment motion in the employment discrimination context: "A trial court must be cautious about granting summary judgment to an employer where, as here, its intent is at issue. Because writings directly supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Gallo*, 22 F.3d at 1223-24. Petitioner suggests that review is warranted in order for this Court to "adopt" this cautionary remark made by the Second Circuit.

But this cautionary approach to summary judgment motions in employment discrimination cases is not limited to the Second Circuit. The Ninth Circuit "has set a high standard for the granting of summary judgment in employment discrimination cases." *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996). In particular, "[t]he Ninth Circuit has instructed that district courts must be cautious in granting summary judgment for employers on discrimination claims." *See Lam v. University of Hawaii*, 40 F.3d 1551, 1564 (9th Cir. 1994) ("'[w]e require very little evidence to survive summary judgment' in a discrimination case, 'because the ultimate question is

one that can only be resolved through a ["]searching inquiry["] – one that is most appropriately conducted by the factfinder'") (quoting, *Sischo-Nownejad v. Merced Comm. Coll. Dist.*, 934 F.2d 1104, 1111 (9th Cir. 1991))."

Moreover, the Supreme Court has already articulated this cautionary approach as applied to summary judgment motions where motive and intent are at issue. "[S]ummary judgment is to be granted with great caution; for 'it is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.'" *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) (antitrust litigation) (internal citation omitted); *see also, Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986) (libel action involving First Amendment).

Finally, it is notable that the District Court here specifically referenced the minimal showing required of an employment discrimination plaintiff to survive summary judgment. "At summary judgment, the degree of proof necessary to establish a prima facie case is 'minimal and does not even need to rise to the level of a preponderance of the evidence.' *Lyons v. England*, 307 F.3d 1092, 1112 (9th Cir. 2002) (quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994) [("*Wallis*")].) Although the burden for establishing a prima facie case is an easy one to satisfy, Plaintiff has failed to do so." (App. B at 14-15.) Thus, Petitioner was not held to an unduly harsh standard that requires revisiting, only to a minimal standard which he failed to meet.

### C. Summary Judgment, as with Many Other Procedural Devices Employed By District Courts, Does Not Violate the Seventh Amendment

Petitioner also argues that this Court should accept review in order to exercise its supervisory powers to ". . . emphasize the implications of the Seventh Amendment right to jury trial when deciding summary judgment motions . . . ." (Petition at 27.) Respondent does not dispute that there is a right to a jury trial in any civil rights case where damages are at issue. This right is guaranteed by the Seventh Amendment to the Constitution. To the extent that Petitioner is suggesting that the summary judgment standard under the Federal Rules violates the Seventh Amendment right to jury trial, this Court held long ago that it does not. Indeed, such contentions have been rejected for more than one hundred years. *See Fidelity & Deposit Co. v. United States*, 187 U.S. 315 (1902); *Burkes v. Wisconsin Dep't. of Transp.*, 464 F.3d 744, 759 (7th Cir. 2006) stating that

> "[t]he Supreme Court has made it abundantly clear that summary judgment has a proper role to play in civil cases, and thus granting summary judgment does not violate a plaintiff's right to due process. We have also stated that summary judgment and Federal Rule of Civil Procedure 56 do not violate the Seventh Amendment, as this argument . . . flies in the face of firmly established law")

(internal citations and quotations omitted).

There have been many procedural devices developed since 1791 which have diminished the civil jury's historic domain and not one of them has been found to violate the Seventh Amendment. *See Galloway v. United States*, 319 U.S. 372, 388-93 (1943) (directed verdict does not violate the Seventh Amendment); *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 497-98 (1931) (retrial limited to question of damages does not violate the Seventh Amendment, even though there was no practice at common law for setting aside a verdict in part); *Fidelity & Deposit Co. v. United States*, *supra*, 187 U.S. at 319-21 (summary judgment does not violate the Seventh Amendment); *Dimick v. Schiedt*, 293 U.S. 474, 486-87 (1935) (remittitur did not violate Seventh Amendment). Thus, Petitioner's argument that review should be granted in order to emphasize the implications of the Seventh Amendment right to jury trial when deciding summary judgment motions should be rejected as long since moot.

### D. Petitioner's Incomplete and Misleading Use of Statistics Does Not Provide an Appropriate Basis for a Grant of Review Here

To support his argument that summary judgment is granted disproportionately to employers, Petitioner relies primarily on statistics recently published by the Federal Judicial Center. *See Report on Summary Judgment Practice Across Districts with Variations in Local Rules* (August 13, 2008) (hereinafter, the "Report"). The data included in the Report, however, were not designed for research into civil justice, litigation theory, or any substantive area of law. T. Eisenberg and M. Schlanger, *The Reliability of the*

*Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 Notre Dame L. Rev. 1455, 1462 (2003). Instead, the data were prepared "as a means of assessing the potential impact of proposed amendments to Rule 56 of the Federal Rules of Civil Procedure" having to do with the potential Rule inclusion of a separate statement of undisputed material facts. *See* the Report at 1. Furthermore, like many large data sets, the Federal Judicial Center data are not completely accurate (*id.* at 1458), and Petitioner's selective citations from the Report are misleading. Petitioner de-emphasizes (by contrasting contract and tort cases), for example, that out of all employment discrimination cases filed, only 11-15% are terminated by summary judgment. *The Report*, Table 12, p. 17. This can only mean that the vast majority of employment discrimination cases either are resolved by a factfinder or settlement.

Furthermore, Petitioner relies upon these statistics to support his argument that this Court should accept review to either (1) reiterate the summary judgment standards for federal district courts, or (2) articulate a new summary judgment standard specifically for employment discrimination cases. Review is not warranted for either reason.

As set forth above, the Rule 56 standards are well established, and to the extent that Petitioner is suggesting Rule 56 be applied differently to employment discrimination cases, or that summary judgment for employment discrimination cases be prohibited or limited in any way, such an argument must be rejected. Modifying the federal rules of civil procedure is not

accomplished by seeking review of a case by the Supreme Court. Instead, such modifications are governed by procedures set forth in 28 U.S.C. sections 2072, 2073, and 2074.

Moreover, Rule 56, along with several other procedural devices (*e.g.*, motions to dismiss for failure to state a claim (Fed. R. Civ. Proc. 12(b)(6)) available to federal district courts, serve the vital role of managing their dockets. The workload of federal district courts has grown substantially in recent decades for the same reasons that have increased demands upon the Supreme Court to hear cases upon appeal. In the two decades between 1971 and 1991, employment law cases saw a staggering 400 percent increase in the federal district courts. *Discharge Is Now Major Focus of Job Discrimination Suits*, Daily Lab. Rep. (BNA) No. 164, at A-3 (Aug. 23, 1991). Between 1990 and 1998, the number of employment civil rights claims increased by an additional 300 percent. Marika F. X. Litras, Ph.D., *Civil Rights Complaints in U.S. District Courts, 1990-98*, NCJ 173427, Jan. 2000, at 2. It is no secret that employment-related litigation has increased by an astonishing rate throughout the last three decades and currently represents a significant portion of the federal judicial caseload. In 2002, for example, employment litigation represented nearly 14 percent of the more than one-quarter million cases filed in United States District Courts. *See*, Office of Human Resources and Statistics, Administrative Office of the United States Courts, Federal Judicial Caseload Statistics March 31, 2002, at 44-46 (2002).

Given the multitude of employment discrimination cases filed each year, summary judgment continues to be an important procedural tool for district courts to help manage their ever-increasing docket. Indeed, the Report stands for no contrary proposition and, if, as Petitioner suggests (though the Report does not necessarily bear this out), summary judgment is granted more frequently in employment discrimination cases versus run-of-the mill common law contract and tort claims, it may well be argued that the statistics *prove*[7] that the latter are more likely to have merit, or at least factual disputes at their core.

### E. Supreme Court Review Is Not Intended to Correct Factual Errors in Lower Court Decisions

Petitioner failed to convince the District Court and the Ninth Circuit that his case had any merit. The within Petition is simply seeking a "third bite at the apple." But, this is not an appropriate basis for Supreme Court review.

> "The function of this Court is not primarily to correct factual errors in lower court decisions, but instead to resolve important questions of federal law and to exercise supervisory power over lower federal courts. Our institutional role properly is focused on ensuring clarity and uniformity of legal doctrine, and not on the case-specific process of reviewing the

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[7] As Mark Twain is oft-quoted as saying, "There are lies, damned lies and statistics."

> application of law to the particularized facts of individual disputes – one of the functions performed quite capably by the federal courts of appeals."

*U.S. v. Young*, 470 U.S. 1, 34 (1985).

Petitioner here improperly seeks review by the Supreme Court to correct perceived factual errors made by both the District Court and the Ninth Circuit Court of Appeals. This request should be denied.

## III. THE LOWER COURTS CORRECTLY APPLIED LONG-STANDING LAW TO THE FACTS BELOW IN GRANTING SUMMARY JUDGMENT

The decisions of the District Court and the Ninth Circuit below not only do not implicate a circuit split or call for a re-examination of summary judgment principles insofar as employment discrimination cases are concerned, they were correctly decided.

### A. Petitioner Does Not Even Assign Error Concerning the Disposition of his Discrimination-Based Claims

The District Court determined that Petitioner had not raised a *prima facie* case of employment discrimination because he was not able to establish a triable issue of fact as to whether (a) he was performing work in a manner acceptable to Respondent, and (b) others outside of the protected class, but otherwise similarly situated, were treated more favorably. (App.

B at 14-18.) Even had Petitioner created a triable issue under his *prima facie* case, the District Court further determined that Petitioner could not establish a triable factual question on the ultimate issue of discriminatory intent, where he could not rebut with substantive, competent evidence that Respondent terminated Petitioner's employment on account of an escalating series of performance issues. (App. B. at 19-22.) The Ninth Circuit affirmed, finding no triable issue created on Petitioner's discrimination claims. (App. A at 2.)

In his Petition, Petitioner tacitly concedes the propriety of the lower courts' summary disposition of his discrimination claims. Petitioner states that "[t]he present case exemplifies the need for review of the question of whether summary judgment is being used improperly and the (*sic.*) for the establishment of the standards for its use . . . ," but does so exclusively by "focus[ing] on the decision of the lower courts on the issue of retaliation." (Petition at 27.) Thus, no error by the lower courts is urged by Petitioner concerning his discrimination claims in seeking Supreme Court review.

### B. The Lower Courts Correctly Held that Petitioner Had Not Adduced Sufficient Evidence to Sustain his Retaliation-Based Claims

In focusing on the issue of retaliation, Petitioner's central contention is that the District Court erroneously granted summary judgment and violated Rule 56 standards (and relevant jurisprudence) by improperly weighing conflicting evidence and deciding matters of disputed fact. The Ninth Circuit rejected these same

contentions and, as noted above, Supreme Court review is not appropriate to simply give Petitioner a third chance to convince a court that a triable factual issues exists in this instance. Further, the ostensible errors pointed to by Petitioner are not that at all; but instead comprise misstatements or misunderstandings of the record and non-material factual discrepancies not warranting trial.

### 1. The District Court Did Not Err in Determining that Proximity Evidence Alone Was Insufficient to Create Triable Issue on Respondent's Supposed Retaliatory Intent

Petitioner chides the District Court for overlooking or ignoring evidence that Petitioner had raised a prior discrimination charge in a Union grievance that preceded his termination by a matter of weeks, and had been criticized at a Union-conducted meeting by co-workers very shortly before his termination. The District Court determined that the significant passage of time – more than seven months – between Petitioner's initial filing of his EEOC Charge and his employment termination – precluded a finding of causal nexus on this basis. (App. B at 23-24; citing, *inter alia*, *Manatt v. Bank of America*, 339 F.3d 792, 808 (9th Cir. 2003) ("*Manatt*") (holding that nine-month period of time between protected activity and alleged retaliatory conduct was too long to create an inference of retaliation).) From this, Petitioner concludes the District Court erred in finding that too much time had passed between Petitioner's legally protected activity and his termination to raise a triable issue on the basis of so-called proximity evidence.

But, the grievance did not constitute additional protected activity (beyond the EEOC Charge); it merely referenced pending protected conduct. More particularly, in grieving the three-day suspension imposed upon Petitioner by Respondent for (a) his failure to appear for work for an important, time-controlled maintenance procedure (because he did not feel as if he should have to do so); and (b) his working of unauthorized overtime, Petitioner wrote as to the nature of his grievance: "Vindictive behavior transpired from *a pending EEOC charge* prompt (*sic*) from the violation of Title VII." (ER/412 (emphasis supplied).) Thus, there was no additional protected conduct on which to predicate a temporal argument.

Even more pertinently, the grievance *followed* the disciplinary action by Respondent. In order to circumstantially establish the necessary element of causation on a retaliation claim, the protected conduct must *precede* the employer's challenged disciplinary action. Temporal proximity is established by showing a close linkage in time of an adverse action *following* on the heels of protected conduct. *See Manatt*, *supra*, 339 F.3d at 802. With regards to Petitioner's referenced grievance, the converse was the case – first, Respondent imposed discipline (the suspension) and only then did Petitioner re-raise the issue of his then pending EEOC Charge. In a related vein, the supposed co-worker harassing comments were not protected activity (at least not on Petitioner's part) and thus there is no relevance on the issue of proximity regarding Respondent's supposed retaliatory intent.

Moreover, Petitioner continues to misapprehend the temporal proximity analysis at its threshold. As the Ninth Circuit has stated, temporal proximity is not itself an element of the *prima facie* retaliation case but, rather, evidence upon which an inference of causation may be drawn. *Porter v. California Dept. of Corrections*, 419 F.3d 885, 895 (9th Cir. 2005). Thus, any bright line rule on temporal proximity has been rejected and, instead:

> "Whether an adverse employment action is intended to be retaliatory is a question of fact that must be decided in the light of the timing and the surrounding circumstances. In some cases, the totality of the facts may form such a clear picture that a district court would be justified in granting summary judgment, either for or against a plaintiff, on the issue of retaliatory motive; but the length of time, considered without regard to its factual setting, is not enough by itself to justify a grant of summary judgment."

*Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir. 2003).

Here, the record reflects that Petitioner had pending an EEOC Charge for more than half of 2002, but yet there was a series of escalating performance deficiencies in January 2003 – effectively unrebutted in the record – which preceded and precipitated Respondent's termination of Petitioner's employment. Accordingly, the finding that Petitioner had failed to demonstrate *prima facie* causation by timing evidence alone was proper here. *See Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 731 (9th Cir. 1986) (timing

evidence alone is not enough to withstand summary judgment where employer has a legitimate stated basis for its challenged actions).

### 2. The Ninth Circuit Did Not Commit Reversible Error in its Characterization of Richard Smith's Role in the Union Meeting/Termination Process

Petitioner also assigns error to the Ninth Circuit in its reference to the lack of any evidence in the record that Petitioner's former supervisor Richard Smith (a) made any affirmatively hostile comments at a referenced Union meeting, and (b) communicated what occurred at that meeting to other members of the management team involved in the decision to terminate Petitioner. (App. A at 3.) But, Petitioner points to no conflicting evidence on these issues, only different facts, *i.e.*, that Smith ostensibly agreed with criticisms of Petitioner as voiced at the meeting and himself was involved in the termination decision. Ultimately, however, the District Court (App. B at 24) and Ninth Circuit (App. A at 3-4) determined that there was no competent evidence to rebut that Respondent acted to terminate based on the performance issues raised, and the past record of discipline. Indeed, the Ninth Circuit specifically found that "[g]iven these legitimate and particularized bases for termination, the fact that one of [Petitioner's] supervisors *participated* in a single allegedly hostile union meeting is insufficient evidence of pretext to survive summary judgment." (App. A at 3-4 (emphasis supplied).) Thus, whether a *prima facie* retaliation case was originally raised is of no moment and does not justify a grant of review by this Court.

### 3. The District Court Did Not Err in Ignoring Supposed Factual Conflicts in Record in Granting Summary Judgment on Petitioner's Retaliation Claims

Petitioner re-raises in his Petition six instances where he claims the District Court ignored or disregarded supposedly competent evidence on the issue of pretext. But, these instances do not bear scrutiny.

1. Petitioner states there was an evidentiary conflict as to whether he was asked about (or whether there was adequate investigation of) his state of mind in terms of his misstatements on Respondent's production documents. HR Manager Joe Gallagher stated an inquiry would have typically been posed of an employee who would be permitted to provide his "side of the story." The undisputed evidence of record, however, is that Smith did ask Petitioner if he changed the filters and Petitioner stated he had done so. (ER/534-535.) Thus, there is no question that Petitioner completed the Respondent's production paperwork erroneously, which was one of the reasons he was terminated as recognized by the District Court. (App. B at 10.) It is not clear how this amounts to a conflict or evidence of pretext in the record.

2. Petitioner states there were also "[c]onflicts" as to who "checked up on his work" on January 24, 2003. (Petition at 30.) In fact, there was no material conflict. Co-worker James Jewell never testified that he "inspected" the work. He testified that Smith told him to take pictures, replace the filter, and copy the logbook

– none of which would make any sense if Smith had not already inspected the work and determined that it had not been completed by Petitioner, as Smith testified he had done. (ER/184:10-186:7.) On the very narrow issue of who actually took certain of the pictures as between Smith and Jewell, even if the testimony were in conflict, it does not serve to create a triable material factual issue on the matter. It is axiomatic that in the face of an employer's properly supported summary judgment motion, the plaintiff may not avoid summary disposition by pointing to minor or immaterial discrepancies in the employer's evidence. *See, e.g., Fogerty v. MGM Group Holdings Corp.*, 379 F.3d 348, 353 (6th Cir. 2004) ("[a] nonmoving party may not avoid a properly supported motion for summary judgment by simply arguing that it relies solely or in part upon credibility considerations. Instead, the nonmoving party must present affirmative evidence to defeat a properly supported motion for summary judgment").

3. Petitioner states there are testimonial conflicts as to whether he was ever asked about the filter job. As stated above, there were not; at least not of a material nature.

4. Petitioner states he believes he changed all of the filters and he denies making deliberate misstatements on production documents. Even leaving aside the admissibility of the cited Petitioner's self-serving declaration testimony in this regard (as contradicting his own prior deposition testimony (*see* App. B at 16-17, n. 2 (evidence excluded by District Court on the basis of this impermissible conflict)), the issue is collateral. The question is not whether Petitioner

actually did engage in the charged misconduct, it is whether Respondent believed that he had done so. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) (irrelevant on issue of pretext whether employee improperly left post as was contended by employer as basis for termination; relevant issue was employer's uncontroverted conclusion that employee had done so). Petitioner has adduced no competent evidence to dispute Respondent's evidence of such convictions.

5. Petitioner states there is a conflict over whether he was ever told by Gallagher to get permission from his supervisor to come meet with him (Gallagher) on the date in question. Petitioner does not, however, refute Gallagher's testimony that he (Petitioner) told Gallagher that he had received supervisor permission (ER/409:2-11), but had not in fact received such permission. (ER/461.) Further, the imagined testimonial conflict here is not material as the issue for Respondent was the undisputed fact that Petitioner had left a job assignment without supervisor approval.

6. Finally, Petitioner states that his supposed struggles to get into and accepted in the HVAC Department are relevant to the issue of retaliatory intent on Respondent's part and a jury should be permitted to "conclude that [he] was seen as a malcontent and trouble-maker who should be gotten rid of because of his co-workers' anger and hostility." (Petition at 32.) But, a triable issue may only be created by admissible evidence. *See* Fed. R. Civ. Proc. 56(e); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995) (only competent evidence is to be

considered in opposition to summary judgment). Petitioner cannot create such an issue by speculating concerning the actions of others. *See Wallis*, *supra*, 26 F.3d at 890 (upon employer's legitimate showing, to defeat summary judgment, plaintiff must then produce "specific, substantial evidence of pretext"); *Lindahl v. Air France*, 930 F.2d 1434, 1437-38 (9th Cir. 1991) ("plaintiff cannot carry [the *McDonnell Douglas*] burden simply by restating the prima facie case and expressing an intent to challenge the credibility of the employer's witnesses on cross-examination.") It was not error for the lower courts to reject such an argument in opposition to summary judgment here.

All told, even were this Court to determine that a demonstration of error below were alone a proper basis for review, Petitioner has failed to make any such showing.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

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(3)

No. 08-1450

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IN THE

# Supreme Court of the United States

LAVON JONES, JR.,

*Petitioner,*

*v.*

BAYER HEALTHCARE LLC,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF

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Petitioner, Lavon Jones, Jr., wishes to respond briefly to statements and arguments made by Respondent in its opposition to the grant of certiorari.

## I.

## In Light of the Pervasive Factual Disputes in This Case, the Grant of Summary Judgment Was In Error

A comparison of the statements of fact in the Petition for Writ of Certiorari with those in he Brief in Opposition demonstrates that virtually every material fact was in dispute in the district court.[1] Thus, with regard to the circumstances surrounding petitioner's termination, the Respondent ignores or attempts to minimize the facts as presented by Petitioner that he neither abandoned his job on January 24, 2003, without authorization nor falsified records with regard to the replacement of filters, the two reasons given for his termination. Respondent takes the position that the conflicts in testimony between Bayer personnel as to crucial events in the sequence that led to the termination were insignificant, a judgment that it was up to the jury to make or reject.

Respondent also claims that Petitioner had an "extensive history" of interpersonal and performance problems at Bayer, but only cites one so-called "example" that occurred *before* Petitioner fought his way into the all-white enclave in the HVAC

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[1]Of course, since Petitioner is the non-moving party, the courts below on the motion for summary judgment were required to accept his version but obviously refused to do so. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

department. That one "example" (see, page 4 of the Brief in Opposition), was not one of "numerous incidents" but in fact was one *instance* in which Petitioner himself took the initiative of going to Human Resources and achieving a satisfactory resolution of an issue precipitated by another worker.[2] The only other pre-HVAC instance cited below by Bayer was another instance of Petitioner initiating an intervention by Human Resources in order to resolve satisfactorily an issue with one of his supervisors.[3] Neither of these two incidents – the only pre-HVAC ones – were the basis for any discipline. It was only when Bayer attempted to justify its retaliatory firing of Petitioner that they were dredged up from his personnel file.

The examples cited by Respondent after Petitioner was taken into HVAC also involved disputed facts. Thus, Petitioner's so-called "rocky probationary period" was caused, according to Petitioner, by hostility towards him by his white co-workers. Nevertheless, his performance was more than satisfactory and, after he took the initiative once again, he was promoted because his work, according to his supervisor, fully justified a promotion. Petition for Writ of Certiorari, pp. 9-10. Respondent also states, as if undisputed, that Petitioner had a "loud profane altercation" with a co-worker, completely overlooking the facts that Petitioner denied

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[2]Declaration of Michael Timberlake in Support of Opposition to Motion for Summary Judgment, p. 2, ¶¶ 5 and 6; 8-10. ER 495. Declaration of Lavon Jones, Jr., p. 3, ¶ 4. ER 453-54.

[3]Declaration of Lavon Jones, Jr., p. 3, ¶ 5. ER 454.

using profane or loud language and there was never any resolution as to what occurred. [4]

This and one other example were the only criticisms made by Bayer until *after* Petitioner filed charges of discrimination internally and with the EEOC. Moreover, it was only after the EEOC had rejected Petitioner's claims in December, 2002, that the sequence of actions that culminated in Petitioner's discharge were taken by Bayer in January, 2003. It was less than a month between Petitioner filing a grievance that accused his supervisor of retaliation and the actions of his supervisor – including taking part in a meeting at which Petitioner was verbally abused for having filed charges of discrimination – that led to Petitioner's being fired.

Of course, and with all due respect, it is not the role of this Court, any more than it was the role of the district court or the court of appeals, to resolve the factual disputes between the parties or, indeed, to determine what did or did not occur. Under Title VII and the Seventh Amendment to the Constitution of the United States, Petitioner was and is entitled to have the issues of fact determined by a jury. It is the denial of that right by the improper use of summary judgment that requires review by the Court.

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[4]Declaration of Lavon Jones, Jr., p. 7, ¶ 20. ER 458.

## II.

## THE QUESTION OF THE WIDESPREAD AND DISPROPORTIONATE DISPOSITION OF EMPLOYMENT DISCRIMINATION CASE THROUGH SUMMARY JUDGMENT IS AN IMPORTANT ONE THAT SHOULD BE EXAMINED BY THIS COURT

Petitioner has set out in some detail the results of recent studies that demonstrate that the use of summary judgment motions to dispose of claims of employment discrimination has become standard operating procedure by defendant employers.[5] To repeat, Petitioner is not claiming that the use of summary judgment in such cases *per se* violates the Seventh Amendment. However, when, as has been noted repeatedly by commentators, over a period of time summary judgment is granted far more often in such cases than in any other category of cases, exercise by this Court of its supervisory powers over the lower federal courts is both warranted and necessary.

In 1991, when Congress extended the scope of Title VII to permit the recovery of money damages for the first time, it did so with full awareness of the right to jury trial that attached. It made the conscious policy decision to place the determination of the merits of such claims in the hands of juries, and not judges. In particular, in cases where there were factual disputes "the elusive factual question of intentional

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[5]*See*, the Petition for Writ of Certiorari at pp. 19-22 and authorities there cited.

discrimination"[6] was to be left to juries. For, as this Court has recognized, the "question facing triers of fact in discrimination cases is both sensitive and difficult".[7]

As this Court held in *Curtis v. Loether*, 415 U.S. 189 (1973), the right to a jury trial to determine these elusive, sensitive, and difficult facts applies with full force to civil rights cases brought to enforce policies of the highest importance to our society. This case presents an ideal opportunity to reiterate the importance of the Seventh Amendment and to ensure that the lower federal courts decide whether to grant motions for summary judge with full awareness of its implications and requirements.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted and the decision of the court below reversed.

Respectfully Submitted,

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[6] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 8 (1981)

[7] *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

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